

Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception

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For much of our history, the Supreme Court has tried to preserve the balance between the states and the nation by dividing up the world into two separate spheres: “local” and “national,” “intra-” and “inter-state,” “manufacturing” and “commerce,” to name just a few. These dichotomies were intended to describe distinct fields of regulatory jurisdiction in which one government or the other would have exclusive authority. The Court’s effort, commonly known as “dual federalism,” died an ignominious death in 1937 or shortly thereafter. Famously elegized by Edward Corwin in 1950,¹ it has not been much mourned since.

Dual federalism died for a reason. Because the theory postulated distinct and exclusive spheres of state and federal regulatory jurisdiction, its coherence depended on interpreters’ ability to define and police the boundaries of those spheres. The problem was that the inevitable overlap of the federal and state spheres became increasingly apparent over the course of the nineteenth and early twentieth centuries. By 1950, the Supreme Court had abandoned the enterprise—not just in terms of defining the limits of the federal commerce power, but also in terms of limiting *state* power under the preemption and dormant Commerce Clause doctrines. In all three areas, the Court switched to a regime of *concurrent* regulatory jurisdiction, with state regulatory authority existing absent discrimination or a clear statement of preemptive congressional intent, and virtually no limits on federal power at all.

My subject in this article is whether the Supreme Court’s present “federalist revival”² has brought “dual federalism” back with it. A number of scholars and dissenting justices have accused the current pro-states majority of doing exactly that.³ Most recently, in *United States v. Morrison*,⁴ Justice

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¹ Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

² The term is Vicki Jackson’s. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998). Kathleen Sullivan prefers “antifederalist revival.” See Kathleen M. Sullivan, *Dueling Sovereignities: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 80 (1995) (emphasis added). My own view is that the eighteenth century terms map so poorly onto present doctrinal and political debates that the choice does not matter.

³ See, e.g., Mathew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, Printz, and Yeskey, 1998 SUP. CT. REV. 71, 72 (“Like the federalism jurisprudence set forth a generation ago, in *National League of Cities v. Usery*, the new jurisprudence of commandeering purports to define an area of total state (and local) immunity from federal intervention.” (footnotes omitted)); Andrew I. Gavil, *Introduction: Seminole Tribe and the Creeping*

Souter accused the Court's majority of adherence to the same sort of "formalistically contrived confines of commerce power" that "provoked the judicial crisis of 1937."⁵ Certainly, the current Court shows more willingness to enforce principles of federalism against the national political branches than we have seen since the New Deal.⁶ But I am doubtful that the Court's "high profile" federalism cases—cases like *Morrison*, *Printz*, *Seminole Tribe*, or *Lopez*—can be assimilated to "dual federalism" without depriving that term of much of its useful meaning. These cases do not, in short, attempt to identify particular subject-matter areas of state regulatory authority and place them off limits to federal action.

The more interesting possibility, in my view, is that dual federalism has tiptoed back into our jurisprudence in a different area: the interaction of state regulation with foreign affairs. The Supreme Court decided two such cases last term: *Crosby v. National Foreign Trade Council*,⁷ which held that federal law preempted trade sanctions imposed by the State of Massachusetts on Burma, and *United States v. Locke*,⁸ which determined that federal law preempted a Washington State regulation of oil tankers in Puget Sound. In both cases, the Court departed from normal rules of preemption based on its view that the cases implicated foreign affairs. Both cases thus may be fairly characterized as examples of "foreign affairs exceptionalism"—that is, the view that "federal regulation of foreign affairs is subject to a different, and generally more relaxed, set of constitutional restraints than federal regulation of domestic affairs."⁹ One aspect of this exceptionalism is the view that state activity is preempted if it intrudes on the sphere of foreign affairs, even in the

Reemergence of "Dual Federalism", 23 OHIO N.U. L. REV. 1393 (1997) (just like it sounds); Jackson, *supra* note 2, at 2183 (suggesting that both *Printz* and *Lopez* assume "that the Constitution must be read to reserve areas for only the states to regulate"); H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 868 (1999) (asserting that *New York* and *Printz* "embrac[ed] the 'dual federalism' or state-sovereignty model [the Court] had abandoned twice before"); Martin H. Redish, *Doing It With Mirrors: New York v. United States and Constitutional Limitations on Federal Power to Require State Legislation*, 21 HASTINGS CONST. L.Q. 593, 596-603 (1994) (arguing that *New York* relied on a theory of exclusive state "enclaves"); Peter M. Shane, *Federalism's "Old Deal": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201, 215 (2000) (advancing a "dual federalism" interpretation of *Lopez*).

⁴ 529 U.S. 598 (2000).

⁵ *Id.* at 643-44 (Souter, J., dissenting) (characterizing the majority's position as insisting that "assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy").

⁶ See, e.g., *Morrison*, 529 U.S. 598 (striking down the federal Violence Against Women Act ("VAWA") as exceeding Congress's authority under the Commerce Clause and Section 5 of the Fourteenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government may not "commandeer" state executive officials); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that Congress may not abrogate the states' sovereign immunity under the Eleventh Amendment); *United States v. Lopez*, 514 U.S. 549 (1995) (holding, for the first time since the New Deal, that a federal statute exceeded Congress's enumerated authority under the Commerce Clause).

⁷ 120 S. Ct. 2288 (2000).

⁸ 120 S. Ct. 1135 (2000).

⁹ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 391 (1998) [hereinafter Bradley, *Treaty Power*].

absence of action by the federal political branches.¹⁰ A milder form, I will argue here, is the application of different preemption rules—in particular, rules that are more likely to result in the displacement of state regulation—tto federal statutes that have a foreign relations component.

Both these forms of foreign affairs exceptionalism depend—as dual federalism did—on the ability of courts to identify and police exclusive spheres for state and federal activity. Just as the *Lochner*-era Court argued that “manufacturing” or “agriculture” were areas of exclusive state regulatory jurisdiction, so, too, foreign affairs exceptionalism claims that the international arena belongs exclusively to the federal government. Any state involvement in that arena may be unconstitutional *per se*,¹¹ or at least will be preempted far more readily than corresponding state activity in the domestic sphere. The fact that foreign affairs exceptionalism has no interest in protecting a corresponding area of *state* sovereignty—an important aim of dual federalism itself—does not eliminate their kinship on the critical point: the commitment to identifying a distinct “field” of regulatory jurisdiction, allocating it to one level of the government, and policing it against “intrusion” by the other level of government.

To state the similarity in structure between dual federalism and foreign affairs exceptionalism is to identify their shared vice. Just as it became impossible by 1937 to isolate “manufacturing” or even “intrastate” activity from the integrated national economy, it is no longer possible in an age of globalization to draw a bright line between “foreign” and “domestic” affairs. We have learned our lesson in respect to the greater part of constitutional law, and the Supreme Court’s new Commerce Clause, commandeering, and state sovereign immunity jurisprudence—whatever else one thinks of these doctrines—can at least exist in a world of predominantly *concurrent* powers. It is time we learned the same lesson in foreign affairs.

In Part One of this article, I lay some groundwork, both definitional and historical. In Part Two, I argue that the main thrust of the Supreme Court’s recent federalism jurisprudence is consistent with the general historical tendency toward concurrent models of federalism. While cases like *Lopez*, *Morrison*, *Printz*, and *Seminole Tribe* are more protective of state sovereignty than anything we have seen from the Court since 1937, they do not fall into dual federalism’s trap of attempting to define exclusive spheres of state authority. Finally, in Part Three I contend that dual federalism *has* survived in the Court’s approach to foreign affairs cases.

One caveat is in order at the outset. My project in this essay is entirely critical—that is, I want to evaluate past and present trends in federalism doctrine without taking a definitive position on what sort of rules ought to replace those doctrines that seem unsatisfactory. In particular, I want to

¹⁰ See, e.g., *Zschernig v. Miller*, 389 U.S. 429 (1968) (striking down Oregon probate provision on the grounds that it risked interference with the federal conduct of foreign affairs); see also Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1226 (1999) [hereinafter Spiro, *Foreign Relations*] (discussing *Zschernig* as one of “three doctrinal components of the exclusivity principle,” the other two being “the dormant foreign commerce power, and the inclusion of customary international law as a part of federal common law”).

¹¹ See *Zschernig*, 389 U.S. at 440-41.

criticize one sort of approach to the relationship between federalism and foreign affairs, predicated on a sharp line between “foreign” and “domestic” concerns, while postponing any thoroughgoing exploration of the alternatives to such an approach for future work. Nothing in my argument is necessarily inconsistent with the position that the blurring of foreign and domestic spheres should bring about a general contraction of state authority, although it will be clear from my discussion that I would not welcome that result. My primary purpose here is simply to sharpen the present debate about federalism in foreign affairs by suggesting that we need *one* set of federalism rules that, while sensitive to context, can be applied across the wide range of situations in which federal and state concerns necessarily intersect.

I. *Dual Federalism and Concurrent Jurisdiction*

Fifty years have passed since Edward Corwin famously lamented “The Passing of Dual Federalism.”¹² The period from 1937 to Corwin’s writing had seen the decisive abandonment not only of *dual* federalism, but also—so it seemed at the time—the notion that the judiciary would enforce *any* federalism limits on Congress’s authority.¹³ Within four years, Herbert Wechsler would help relegate federalism concerns to the none-too-tender mercies of the federal political process.¹⁴ Except for the minor and ill-fated anomaly of *National League of Cities v. Usery*,¹⁵ Corwin’s assertion that the “entire system of constitutional interpretation” embodied in dual federalism lay “in ruins”¹⁶ was an accurate description of constitutional law for nearly a half century.

Before assessing whether the Rehnquist Court’s “federalist revival” fits the model of dual federalism, one must admit that terms like “dual federalism” and its close relative “dual sovereignty” have not always been used with a great deal of precision. For some commentators, “dual federalism” functions mostly as an epithet, connoting nothing more specific than excessive judicial activism on federalism issues.¹⁷ I have something more specific than that in mind, however. “Dual federalism,” as used here, connotes a particular approach to federalism doctrine that has generated a particular set of problems. One can be a strong partisan of “states’ rights” without embracing dual federalism, or a strong critic of the federalist revival while acknowledging that the new doctrines have *different* problems.

This Part of the article begins by drawing three distinctions that are important to the argument that follows: between “dual federalism” and the more general idea of “dual sovereignty”; between dual federalism and concurrent jurisdiction as ways of promoting dual sovereignty; and between the idea that certain federal (or state) *powers* may be exclusive and that one level

¹² See Corwin, *supra* note 1.

¹³ See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁴ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

¹⁵ 426 U.S. 833 (1976).

¹⁶ Corwin, *supra* note 1, at 17.

¹⁷ See, e.g., Moulton, *supra* note 3, at 868.

of government may have exclusive regulatory jurisdiction over an entire *field* of regulatory concern. I then recount the historical rise and fall of dual federalism doctrine in the nineteenth and early twentieth centuries. I conclude by describing the contemporary ascendancy of the concurrent model of regulatory jurisdiction.

A. *Defining Terms*

Professor Corwin's famous article defined "Dual Federalism" as a combination of four "postulates":

1. The national government is one of enumerated powers only; 2. Also the purposes which it may constitutionally promote are few; 3. Within their respective spheres the two centers of government are "sovereign" and hence "equal"; 4. The relation of the two centers with each other is one of tension rather than collaboration.¹⁸

I am interested less in Corwin's specific postulates than the common theme that they suggest: that Article I's limits on Congress's powers and purposes (postulates 1 and 2) define separate "spheres" of sovereignty for the federal and state governments (postulate 3), neither of which permits intrusion or activity by the other level of government (postulate 4). It is this notion of separate "spheres" or "enclaves" that has set "dual federalism" apart from other approaches to federalism for the generations of commentators that have followed Corwin. As Alpheus Mason wrote, "[d]ual federalism" contemplates "two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions."¹⁹

"Dual federalism" is sometimes confused with "dual sovereignty." The confusion is understandable, given the similarity of the terms, but the distinction is important. Dual *sovereignty* refers to the Federalists' great innovation in political theory, which accommodated the separate authority of the states to classical political theory's requirement of a single "sovereign" in every polity by lodging that ultimate sovereignty in the American people.²⁰ As Justice Souter has explained, "[t]he People possessing this plenary bundle of specific powers were free to parcel them out to different governments and different

¹⁸ Corwin, *supra* note 1, at 4.

¹⁹ Alpheus Thomas Mason, *The Role of the Court, in* FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE 8, 24-25 (Valerie A. Earle, ed., 1968); see also John Kincaid, *From Dual to Coercive Federalism in American Intergovernmental Relations*, in GLOBALIZATION AND DECENTRALIZATION: INSTITUTIONAL CONTEXTS, POLICY ISSUES, AND INTERGOVERNMENTAL RELATIONS IN JAPAN AND THE UNITED STATES 29 (Jong S. Jun & Deil S. Wright eds., 1996) [hereinafter GLOBALIZATION AND DECENTRALIZATION] ("Dual federalism was marked . . . [by] maintenance of the independent integrity of federal powers and state powers through separations of national and state spheres of action."); MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 26 (1995) (contrasting "dual" and "cooperative" federalism).

²⁰ See generally *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty."); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* 524-32 (1969); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1434-36 (1987).

branches of the same government as they saw fit.”²¹ Dual sovereignty thus means that the federal and state governments are “each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”²²

One might legitimately question the usefulness of “sovereignty” to describe the complicated allocation of authority between the federal and state governments. Neither government, after all, possesses the unaccountable authority that the classical theorists of unitary sovereignty envisioned.²³ As Gordon Wood has recounted, the Federalists recognized this reality and at first straightforwardly challenged the need for a theory of “sovereignty” at all; they adopted the dual conception only after it became apparent that many of their countrymen were too wedded to the idea of sovereignty to give it up altogether.²⁴ In this sense, “dual sovereignty” is a debating point—a way of capturing the other side’s rhetoric and using it against them. But “dual sovereignty” does capture an important truth about American federalism: Although nonfederal regimes may make the political choice to decentralize certain functions, the “sovereignty” of the states and the federal government means that at least some elements of the American allocation of authority are enforceable as a matter of legal right.²⁵

One way to keep the delegated powers of the states and the federal government separate and distinct is to define exclusive subject-matter spheres of activity for each; in this sense, dual federalism is one subspecies of dual sovereignty. But separate spheres are not the *only* way to enforce dual sovereignty; as Larry Kramer has observed, “just because it’s no longer possible to maintain a *fixed* domain of exclusive state jurisdiction it’s not necessarily impossible to maintain a *fluid* one.”²⁶ I have argued elsewhere that dual sovereignty retains significant potential as a judicial common ground on federalism because it respects both federal and state prerogatives.²⁷ And I will argue further below that other models of federalism provide ample means of preserving dual *sovereignty* even if dual *federalism* must be rejected.²⁸

21 *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 151-52 (1996) (Souter, J., dissenting).

22 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819).

23 See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 160-61 (1765) (referring to “absolute despotic power” as a prerequisite of all governments); see also SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 146-48 (1993) (discussing the British theory of sovereignty).

24 WOOD, *supra* note 20, at 526-30.

25 E.g., BEER, *supra* note 23, at 152-53; Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910-12 (1994).

26 Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1499 (1994); see also Jackson, *supra* note 2, at 2233 (suggesting a scrutiny of the relationship between Congress’s means and its ends as an alternative to “enclave theory”); Redish, *supra* note 3, at 596-603 (arguing that limits on Congress’s enumerated powers may be enforced without recourse to exclusive state enclaves).

27 Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 SUP. CT. REV. 1, 70-73 [hereinafter Young, *State Sovereign Immunity*] (demonstrating that a large majority of the present Court have, at one time or another, advocated some form of dual sovereignty); see also Ernest A. Young, *Alden v. Maine and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1644-45 (2000) (discussing the Court’s use of the political theory of dual sovereignty).

28 See discussion *infra* Part II.

Dual federalism's primary competitor in this regard is the model of *concurrent* regulatory authority. The model is familiar from judicial jurisdiction: under the Federal Judicial Code, the state and federal courts have concurrent jurisdiction to hear most cases that fall within Article III.²⁹ This shared jurisdiction is not inconsistent with important elements of hierarchy. The removal statutes, for example, create a right for some parties to be in federal court if they want to be,³⁰ and most areas of concurrent jurisdiction exist at Congress's sufferance.³¹ Furthermore, the *Murdock* and *Martin* doctrines provide that the state and federal supreme courts, respectively, have the final say over issues of state and federal law that fall within this broad area of concurrent jurisdiction.³² In much the same way, the Supremacy Clause structures the relationship between federal and state law in areas of shared *regulatory* authority by providing that federal law prevails in the event of a conflict.³³

Just as concurrent regulatory jurisdiction can coexist with federal supremacy, it is also not inconsistent with the idea that certain *powers* may be exclusively vested in one government or the other. State and federal governments have broad concurrent regulatory authority over the economy, but the Constitution expressly denies states the right to lay duties on imports without congressional consent or to pursue monetary policy by coining their own money and setting its value.³⁴ Similarly, as I will discuss further in Part II, current Commerce Clause doctrine provides for broad concurrent jurisdiction over criminal law, but the federal government may not criminalize behavior that is not "commercial" in some respect.³⁵ And, as I discuss in Part III, states have engaged in a broad range of international activities, but the federal government retains the exclusive power to make treaties with foreign governments.³⁶

This distinction between concurrent regulatory jurisdiction over broad areas of public policy and the exclusivity of certain powers that may be useful within those fields is important to the discussion that follows. A final example may solidify the point: If any federal power is exclusive, it is the power to declare war. Not only is that power given expressly to Congress (along with the powers to raise an army and navy), but the States are expressly denied powers to commit certain provocative acts like entering into alliances or

²⁹ *E.g.*, *Tafflin v. Levitt*, 493 U.S. 455 (1990).

³⁰ *E.g.*, 28 U.S.C. § 1441 (1994) (providing for removal by the defendant in any civil action where the federal court would have had original jurisdiction, subject to certain restrictions).

³¹ *E.g.*, 28 U.S.C. § 1338(a) (1994) (providing for exclusive federal jurisdiction in patent and copyright cases).

³² *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590 (1875) (holding that state supreme court interpretations of state law are binding on the U.S. Supreme Court); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court has the last word on issues of federal law decided by the state courts); *see also* *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (holding that federal procedure governs certain aspects of federal question claims brought in state court); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that state law governs in federal court actions where jurisdiction depends on diversity of citizenship).

³³ U.S. CONST. art. VI, cl. 2.

³⁴ *Id.* art. I, § 10.

³⁵ *Infra* text accompanying notes 137-38.

³⁶ U.S. CONST. art. I, § 10.

granting letters of marque.³⁷ But I would hesitate to say that Congress therefore has exclusive authority over the *field* of "military affairs." States have extensive concurrent power, for example, to employ and to administer the National Guard and to punish military personnel for crimes committed against civilians.³⁸

There are difficulties, of course, in speaking of regulatory "fields" at all. As any law professor who has put together a syllabus knows, all of the supposedly distinct fields of legal learning overlap in practice. Takings turn up in constitutional, property, and telecommunications law; marital property implicates both family and trusts and estates law; trade secrets issues arise in both employment and intellectual property law. That is precisely why only *powers* can be exclusive. Judicial efforts to define and to police exclusive fields of regulatory authority have failed, in almost every case, due to the inherent difficulty of drawing coherent boundaries. I recount that story in the next section.

B. *Dual Federalism's Rise and Fall*

History provides any number of examples of "dual federalist" doctrine. Chief Justice Marshall's groundbreaking opinion in *Gibbons v. Ogden*,³⁹ for all its generosity toward federal power, also took care to preserve a residual enclave of state authority. The Commerce Clause's reference to commerce "among the several States," Marshall said, does not

comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. . . .

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one.⁴⁰

Gibbons thus recognized both a national, "interstate" economy and a local, "intrastate" economy. The former was a federal province, while the latter was reserved to the States.⁴¹

³⁷ Compare *id.* art. I, § 8, cls. 11-13, with *id.* § 10, cl. 1.

³⁸ See, e.g., *Perpich v. Department of Defense*, 496 U.S. 334, 353-54 (1990) (observing that the Militia Clauses mandate both a federal and state role concerning the National Guard); *Caldwell v. Parker*, 252 U.S. 376 (1920) (holding that state courts retain jurisdiction to try soldiers for crimes not dedicated to military courts-martial by statute).

³⁹ 22 U.S. (9 Wheat.) 1 (1824).

⁴⁰ *Id.* at 194.

⁴¹ *Id.* at 194-95; see also *Geer v. Connecticut*, 161 U.S. 519, 531 (1896) ("The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court."); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 22 (1877) ("The power vested in Congress to regulate commerce 'among the several States' does not authorize any interference with the commerce which is carried on entirely within a State."). In *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870), the Court observed that

There is undoubtedly an internal commerce which is subject to the control of the States. The power delegated to Congress is limited to commerce "among the several States," with foreign nations, and with the Indian tribes. This limitation necessarily excludes from Federal control all commerce not thus designated, and of

This distinction, however, was incomplete from the beginning. As *Gibbons* acknowledged, some state regulation of commerce designed to protect the public health and safety is both necessary and legitimate.⁴² The validity of state regulation thus turned, for a time, on whether it was best characterized as “commercial” or “police” legislation.⁴³ The commerce/police test in turn gave way to a different subject matter test in *Cooley v. Board of Wardens*, wherein Justice Curtis was forced to acknowledge that

the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a uniform rule, operating equally on the commerce of the United States in every port; and some . . . as imperatively demanding that diversity, which alone can meet the local necessities of navigation.⁴⁴

Cooley thus abandoned *a priori* subject-matter tests, at least for “dormant” Commerce Clause situations, in favor of a more practical inquiry into the necessity of national uniformity: “Whatever subjects of [the commerce] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”⁴⁵ This inquiry, however, still contemplates a world of subject-matter enclaves. Some subjects are exclusively “national”; others are “local” in nature and therefore left to the states.⁴⁶

Cooley’s national/local divide eventually gave way to an effort to distinguish between “commerce” and other forms of economic activity, like manufacturing or agriculture, and between “direct” and “indirect” effects on commerce. Initially, the Court deployed these inquiries—like *Gibbons* and *Cooley* before them—in policing the exclusivity of *federal* control over interstate commerce.⁴⁷ Later, the distinctions became a tool for protecting an enclave of *state* authority over intrastate commerce from incursions by federal

course that commerce which is carried on entirely within the limits of a State, and does not extend to or affect other States.

Id. at 564-65.

⁴² *Gibbons*, 22 U.S. (9 Wheat.) at 203; see also GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 264 (13th ed. 1997) (observing that Marshall’s “suggestion of a possibly exclusive national commerce power coexisted with a recognition of state power to enact legislation which might affect commerce—‘[i]nspection laws, quarantine laws, health laws of every description’”) (quoting *Gibbons*, 22 U.S. (9 Wheat.) at 203).

⁴³ E.g., *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 132 (1837) (upholding a New York statute requiring arriving ship captains to provide information on passengers on the ground that it was “not a regulation of commerce, but of police”).

⁴⁴ *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851).

⁴⁵ *Id.*

⁴⁶ The Court adopted a similar approach to defining the appropriate scope of federal maritime law *vis-à-vis* state law in admiralty cases. *Western Fuel Co. v. Garcia*, 257 U.S. 226, 242 (1921) (permitting states to “legislate freely on shipping matters that are of predominantly local concern”); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 297-98 (1999) [hereinafter Young, *Preemption at Sea*] (discussing the “maritime but local” doctrine).

⁴⁷ E.g., *Kidd v. Pearson*, 128 U.S. 1 (1888) (upholding state prohibition on manufacture of liquor on the ground that it did not regulate “commerce”); *Smith v. Alabama*, 124 U.S. 465 (1888) (upholding state regulation of railroad engineers against dormant Commerce Clause challenge on the ground that the regulation’s effect on interstate commerce was “indirect”); see also

legislation.⁴⁸ Distinguishing “commerce” from other economic activities, of course, looks much like the Marshall Court’s line between “commerce” and “police” regulation. But the direct/indirect analysis can be thought of as an acknowledgement of two forms of economic integration, that is, that all forms of production and consumption have an impact on the “commerce” market for goods and services; and that local markets are increasingly integrated with national ones. The Court’s distinction sought to maintain exclusive spheres for state and national authority by insisting on the viability of boundaries despite the interdependence of different markets and activities.

The Court has also sought to support and strengthen exclusive enclave doctrines by inquiring into the government’s purpose in regulating within a particular area. Professors Gunther and Sullivan suggest, for example, that the commerce/police distinction was in fact a *purpose* test.⁴⁹ Although Justice Marshall acknowledged in *Gibbons* that the state police power might “adopt a measure of the same character with one which Congress may adopt,” he insisted that such a measure would involve the exercise of a different “power.”⁵⁰ Because commerce and police measures could not always be distinguished on the face of the statute, the Court’s attention to legislative purpose functioned as a useful proxy. The direct/indirect cases were likewise buttressed by an inquiry into legislative purpose.⁵¹ Here again, the purpose inquiry compensates for indeterminacy at the boundaries of subject-matter enclaves by using legislative purpose as a proxy.⁵²

The Court has also used legislative purpose as a decisive factor when supposedly exclusive enclaves turn out to overlap. Chief Justice Marshall’s opinion in *McCulloch v. Maryland*, for example, strongly suggested that “should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal . . . to say, that such an act was not the law of

DiSanto v. Pennsylvania, 273 U.S. 34 (1927) (striking down state licensing law governing travel agents on grounds of a direct effect on foreign commerce).

⁴⁸ E.g., *Hammer v. Dagenhart*, 247 U.S. 251, 273-74 (1918) (“The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.”); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (construing the Sherman Act not to reach monopolies over “manufacturing,” on the ground that the effect of such monopolies on interstate commerce is only “indirect”).

⁴⁹ GUNTHER & SULLIVAN, *supra* note 42, at 264.

⁵⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824).

⁵¹ *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (invalidating state highway regulation on the basis of the state government’s purpose to prohibit competition rather than promote safety); GUNTHER & SULLIVAN, *supra* note 42, at 269 (discussing the use of purpose analysis in licensing cases).

⁵² Professor Corwin suggested the linkage between purpose and subject-matter limits when he observed:

While . . . the Police Power was defined in the first instance with the end in view of securing to the States a near monopoly of the right to realize the main *objectives* of government, the concept came later to embrace the further idea that certain *subject-matters* were also segregated to the States and hence could not be reached by any valid exercise of national power.

Corwin, *supra* note 1, at 16.

the land.”⁵³ This reasoning carried the day in *Hammer v. Dagenhart*,⁵⁴ where the Court found that Congress had used its undisputed power to regulate the interstate shipment of goods as a hook to regulate child labor conditions within individual states.⁵⁵ Although the Court failed to apply this purpose inquiry consistently even prior to 1937,⁵⁶ the pretextual purpose inquiry did preserve a form of exclusivity for enclaves of state authority, despite the reality that those enclaves might frequently overlap with the federal sphere in practice.

A final, more recent example of the “dual federalism” model is the short-lived doctrine of *National League of Cities v. Usery*.⁵⁷ That doctrine, as distilled in subsequent cases, held that legislation that would otherwise be within the scope of Congress’s enumerated powers was nonetheless invalid if it (1) regulated the “States as States,” (2) concerned matters that are “indisputably ‘attribute[s] of state sovereignty,’” and (3) directly impaired states’ ability to “structure integral operations in areas of traditional governmental functions.”⁵⁸ *National League of Cities* itself held that the Fair Labor Standards Act’s wage and hour rules could not be applied to state governmental employees;⁵⁹ later cases found the Justices unable to agree on a viable definition of “traditional governmental functions,”⁶⁰ and the Court ultimately abandoned the doctrine ten years later.⁶¹ But *National League of Cities* had the feel of a “last gasp” for dual federalism even before it was overruled. Unlike previous incarnations of the model, *National League of Cities* protected only the internal operations of state governments, not their regulatory jurisdiction over private activity in particular areas.⁶² Nor was state authority

⁵³ *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 422 (1819).

⁵⁴ 247 U.S. 251 (1918).

⁵⁵ Although the Court claimed that it had “neither authority nor disposition to question the motives of Congress in enacting this legislation,” *id.* at 276, the kinship to Chief Justice Marshall’s “pretext” reasoning is clear.

⁵⁶ *E.g.*, *Hoke v. United States*, 227 U.S. 308 (1913) (upholding the Mann Act, which prohibited the transportation of women in interstate commerce for immoral purposes); *Champion v. Ames*, 188 U.S. 321 (1903) (upholding the Federal Lottery Act, which banned interstate shipment of lottery tickets). In both of these cases, it seems obvious that the federal purpose was to make life difficult for the underlying activities, i.e., prostitution and lotteries.

⁵⁷ 426 U.S. 833 (1976). See Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1454 (1995) (discussing the kinship of *National League of Cities* to the nineteenth century dual federalism cases). But see Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1806-07 (1995) (arguing that “*Usery*’s protection for traditional governmental functions . . . should not be understood as a modern effort to arouse dual federalism from its post-New Deal slumber”).

⁵⁸ *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 287-88 (1981) (citations omitted).

⁵⁹ *National League of Cities*, 426 U.S. at 852.

⁶⁰ *E.g.*, 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-11, at 866-73 (3d ed. 2000).

⁶¹ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985).

⁶² Dailey, *supra* note 57, at 1806-07; Young, *State Sovereign Immunity*, *supra* note 27, at 32 (observing that *National League of Cities* “allowed state governments to stand apart from a federal regulatory scheme, but did nothing to protect their own regulatory power over their citizens”). For this reason, I have elsewhere described *National League of Cities* as a form of “immunity federalism.” See *id.* at 31-32.

particularly exclusive even within this narrow sphere, as the Court was willing to recognize “situations in which the federal interest advanced may be such that it justifies state submission.”⁶³

The Court’s earlier, more substantive forays into dual federalism did not work out well, either. They have, almost without exception, been replaced by regimes predicated on the existence of *concurrent* regulatory authority at the state and federal level. I discuss these concurrent power regimes in the next section.

C. The New World of Concurrent Jurisdiction

The abandonment of dual federalism has been most obvious—and probably least controversial—in the context of the dormant Commerce Clause. The Court’s modern cases “have generally abandoned any attempt to apply categorical distinctions between exercises of ‘police’ and ‘commerce’ powers, between ‘local’ and ‘national’ subject matters, or between ‘indirect’ and ‘direct’ effects.”⁶⁴ Instead, we see a general prohibition on state regulation that *discriminates* against out-of-state business, regardless of subject matter.⁶⁵ This sort of anti-discrimination principle is a doctrine of *concurrent* power—it requires state governments to regulate in an even-handed way, without limiting the subject-matter upon which their regulation can operate. Concurrent models thus stand in opposition to dual federalism’s imperative of identifying discrete enclaves of exclusive power for both federal and state governments.

Concurrent models have become increasingly important in other areas of federalism doctrine as well.⁶⁶ Modern preemption doctrine—which I have argued elsewhere may be the most critical aspect of federalism doctrine because it bears most directly on the survival of state regulatory authority⁶⁷—is quintessentially a doctrine of concurrent power. It was not always thus. As Stephen Gardbaum has ably described, the Court’s first “consistently clear and explicit statements of genuine preemption principles” emerged in the period from 1912 to 1920.⁶⁸ During these years, which saw the invalidation of many state laws on preemption grounds, “[t]he effect of congressional ac-

⁶³ *Hodel*, 452 U.S. at 288 n.29.

⁶⁴ GUNTHER & SULLIVAN, *supra* note 42, at 270.

⁶⁵ E.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (noting that state laws discriminating against interstate commerce are “virtually *per se* invalid”).

⁶⁶ See generally Young, *State Sovereign Immunity*, *supra* note 27, at 26-29 (suggesting that concurrent power approaches may be superior to attempts to identify exclusive enclaves of state authority); Young, *Preemption at Sea*, *supra* note 46, at 329-33 (arguing that traditionally *federal* enclaves also increasingly overlap with legitimate state regulatory interests).

⁶⁷ Ernest A. Young, *Two Cheers for Process Federalism*, 47 VILL. L. REV. (forthcoming 2001) (manuscript Part II) [hereinafter Young, *Two Cheers for Process Federalism*]; Young, *State Sovereign Immunity*, *supra* note 27, at 39-42 (arguing that a regulatory preemption case, *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), was actually the most important federalism case of the Supreme Court Term that also included *Alden* and two other major Eleventh Amendment cases). See also *Geier v. Am. Honda Motor Co., Inc.*, 120 S. Ct. 1913, 1928 (2000) (Stevens, J., dissenting) (recognizing that preemption cases are “about respect for ‘the constitutional role of the States as sovereign entities’”) (quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

⁶⁸ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 801 (1994).

tion" in any given regulatory field was "to end the concurrent power of the states and thereby to create exclusive power at the federal level from that time on."⁶⁹ We might think of this as a form of "federal option" dual federalism where states would possess concurrent authority absent federal activity, but any federal entrance would preempt all state regulation and create an exclusive federal enclave.⁷⁰

Such a regime was tolerable because the scope of potential federal activity, under prevailing interpretations of the Commerce Clause, was quite narrow. The subsequent expansion of federal authority, however, necessitated a corresponding change in preemption doctrine. "In this context of a revolutionary extension of federal legislative competence," Professor Gardbaum observes, "the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction."⁷¹ The Court's modern preemption cases, beginning with cases decided in the midst of the New Deal Crisis and subsequent expansion of federal Commerce Clause authority,⁷² thus acknowledge the possibility that both federal and state governments may have regulatory jurisdiction over a particular subject at any given time and seek to moderate actual and potential conflicts between the two authorities.⁷³ Current doctrine thus asks simply whether Congress *intended* to displace a given state rule; if not, state concurrent authority survives despite the presence of federal regulation.⁷⁴

Consistent with this shift to concurrent power, the Court has generally abandoned the legislative purpose inquiries that helped shore up the prior dual federalism regime.⁷⁵ *United States v. Darby*⁷⁶ overruled *Hammer v. Dagenhart* (and *McCulloch*) on the issue of pretext, and *Katzenbach v. McClung*⁷⁷ and *Heart of Atlanta Motel, Inc. v. United States*⁷⁸ made clear that without a pretext inquiry, Congress could use the commerce power to intrude into all sorts of substantive areas previously thought to be reserved to the states. Likewise, the Court's refusal to impose a purposive limit on the Tax-

⁶⁹ *Id.*; see, e.g., *Southern Ry. Co. v. Reid*, 222 U.S. 424, 436 (1912); David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51, 53 (1973) ("[A]ny concurrent power over a particular matter that might have been left to the states . . . ceased to exist the moment Congress exerted its own power over that matter.").

⁷⁰ See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 166-67 (commenting that "automatic field preemption . . . operated strongly to empower the nationalization of domains of law").

⁷¹ Gardbaum, *supra* note 68, at 806.

⁷² *Mintz v. Baldwin*, 289 U.S. 346 (1933); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

⁷³ Gardbaum, *supra* note 68, at 806.

⁷⁴ *Id.*; see also *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (insisting that Congress's intent remains "the ultimate touchstone in every pre-emption case" (citation omitted)).

⁷⁵ See, e.g., Charles Fried, *Foreword: Revolutions?* 109 HARV. L. REV. 13, 40 ("Given the plenary nature of the very idea of regulation, the search for motive states in some earlier cases is properly discarded, not as too intrusive or difficult, but as irrelevant.").

⁷⁶ 312 U.S. 100, 116-17 (1941).

⁷⁷ 379 U.S. 294, 302-04 (1964).

⁷⁸ 379 U.S. 241, 258 (1964).

ing or Spending Clauses⁷⁹ has given Congress additional tools to reach into any conceivable enclave of exclusive state power.⁸⁰

In almost every instance, the Court's retreat from dual federalism to a concurrent power model has been prompted by changes in the American economy and society at large that have made exclusive enclaves of state (or federal) authority increasingly difficult to identify and to police.⁸¹ As Vicki Jackson has observed, "without written guideposts on the content of the enclaves in the face of changing economies and functions of government, the substantive enclave theory is unworkable."⁸² In particular, the integration of the national economy has made it impossible to wall off an "intrastate" market from the rest of the Nation, or to isolate processes like "manufacturing" or "agriculture" from other steps in the chain of commerce. A lesser noted—but perhaps equally important—form of integration concerns the relation of "economic" and "non-economic" concerns. As cases like *McClung* and *Heart of Atlanta* make clear, ordinary transactions like eating barbecue or renting a hotel room may have implications far beyond the economic sphere.⁸³

Where Congress's affirmative authority under the Commerce Clause has been concerned, the abandonment of state enclaves has been accompanied by a dramatic expansion of federal authority generally; at least until the 1990s, no alternative restrictions on federal power had arisen to fill the void left by the abandonment of dual federalism.⁸⁴ The Rehnquist Court's attempt to breathe new life into federalism comes at a time when the integration of economic and social life seems to be accelerating, prompting charges that the same forces that doomed dual federalism will overwhelm this new initiative.

79 U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States.").

80 E.g., *South Dakota v. Dole*, 483 U.S. 203 (1987) (acknowledging that the spending power could be used to reach even textually-protected enclaves like the States' exclusive authority to regulate alcohol under the Twenty-first Amendment); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1914 (1995) (arguing that "with *Dole*, the Court offered Congress a seemingly easy end run around any restrictions the Constitution might impose on its ability to regulate the states").

81 See Bednar & Eskridge, *supra* note 57, at 1454 n.30; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 289 (2000); Lessig, *supra* note 70, at 137-44. As Professor Lessig has explained, these changes have been accompanied by changes in the legal culture that have made formal boundaries between state and federal spheres increasingly suspect. *Id.* at 176-77.

82 Jackson, *supra* note 2, at 2232.

83 The relationship runs both ways. Various forms of discrimination and personal oppression, for instance, may have far-reaching economic effects. See *United States v. Morrison*, 529 U.S. 598, 628-34 (2000) (Souter, J., dissenting) (canvassing congressional findings that violence against women has a considerable impact on the national economy).

84 To be sure, the shift to concurrent power regimes under preemption doctrine and the dormant Commerce Clause have generally served to relax limits on state regulatory authority. Lessig, *supra* note 70, at 167-68. It seems unlikely, however, that the net effect has been sufficient to balance the post-New Deal expansion of the federal commerce power.

II. *Looking for Dual Federalism in All the Wrong Places: The "Federalist Revival" and Its Critics*

The Rehnquist Court's critics have not hesitated to tag cases like *Lopez*, *Printz*, and even *Seminole Tribe* with the label of "dual federalism." Peter Shane, for example, has characterized the Court's recent decisions as "Federalism's 'Old Deal,'" a product of the Court's "enduring preoccupation[]" with "[d]elineating the respective spheres of national and state regulatory authority."⁸⁵ While the connection is understandable and, in some cases, invited by the Court's rhetoric, I remain doubtful that most of the new cases can be dubbed "dual federalism" without expanding that term beyond any useful limits.

In explaining why dual federalism is an awkward label for describing the current Court's federalism jurisprudence, it will help to distinguish five main doctrinal currents:

- (1) *State sovereign immunity cases*, in which the Court has expanded the Eleventh Amendment and background principles that the Amendment is thought to signify to block remedies against state governments under federal law;⁸⁶
- (2) *Anti-commandeering cases*, in which the Court has forbade Congress from "commandeering" state officers and legislatures to assist in the implementation of federal law;⁸⁷
- (3) *Clear statement rule cases*, in which the Court has developed canons of statutory construction that protect various aspects of state sovereignty;⁸⁸
- (4) *Commerce Clause cases*, in which the Court has held some private activity to be outside the Clause's reach, despite the allegation that the activity may "affect" interstate commerce;⁸⁹ and
- (5) *Section Five cases*, in which the Court has required that legislation designed to enforce the Reconstruction Amendments must target actual constitutional violations and be proportional to the scope of those violations.⁹⁰

Whatever other problems each of these doctrinal initiatives may have—and I think some are very positive while others are quite troubling⁹¹—none of

⁸⁵ Shane, *supra* note 3, at 203.

⁸⁶ *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); see generally Young, *State Sovereign Immunity*, *supra* note 27, at 51 (arguing that "immunity federalism is the Court's new strategy of choice for preserving, or reestablishing, some balance between state and nation").

⁸⁷ *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

⁸⁸ *Jones v. United States*, 120 S. Ct. 1904 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981).

⁸⁹ *United States v. Morrison*, 529 U.S. 598, 606-19 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

⁹⁰ *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631 (2000); *Morrison*, 529 U.S. at 617-28.

⁹¹ See generally Young, *State Sovereign Immunity*, *supra* note 27 (comparing "process," "power," and "immunity" strategies for protecting federalism).

these initiatives fits comfortably under the rubric of dual federalism. I begin this Part with the easiest cases supporting this proposition: the state sovereign immunity, anti-commandeering, and clear statement cases. I then consider the Commerce Clause and Section Five cases, which pose more difficult issues. I conclude with a brief discussion of whether, if the Court's doctrines do *not* in fact protect any particular area of exclusive state jurisdiction, they might nonetheless serve some useful purpose.

A. Sovereign Immunity, Anti-Commandeering, and Clear Statements

State sovereign immunity is not a doctrine of regulatory jurisdiction at all. Most obviously, it has nothing to do with Congress's ability to regulate private conduct;⁹² dual federalism by contrast, has generally tried to place certain forms of private activity (e.g., family law, criminal law) off limits to federal authority. Nor does sovereign immunity even place the much more limited sphere of state governmental conduct off limits to federal regulation, as the *National League of Cities* doctrine once tried to do.⁹³ Rather, the Court has made clear that the states remain subject to federal law, enforced through such means as suits by the United States, suits against state officers for injunctive relief, or waivers of immunity imposed as a condition for receipt of federal benefits.⁹⁴

Similarly, the anti-commandeering doctrine simply prohibits the use of the states as federal agents, not direct regulation (of the states themselves or private activity) by Congress.⁹⁵ As Justice O'Connor made clear in *New York*, the whole point of the anti-commandeering doctrine is that "*even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.*"⁹⁶ Both anti-commandeering and state sovereign immunity are thus limits on the *means* that Congress can use—no implementation through state agents, no imposition of financial liability on the states—not the subjects that it can regulate or the purposes that it may pursue. As such, both approaches are quintessential doctrines of *concurrent* power.

⁹² *Id.* at 55 ("While immunity federalism focuses on foreclosing federal interference with state government activity within the state's sphere of responsibility, immunity does not itself guarantee the continued existence or extent of that sphere.").

⁹³ *Id.* at 57 ("[S]overeign immunity only blurs the enforceability of federal statutes against the states at the behest of private individuals; it does not absolve the states of their obligation to follow federal law."); Mitchell N. Berman, R. Anthony Reese, & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How To "Fix" Florida Prepaid (And How Not To)*, 79 TEXAS L. REV. 1037 (2001) (illustrating ways of avoiding state sovereign immunity and holding states accountable for violations of federal law, despite *Seminole Tribe* and its progeny).

⁹⁴ John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 51 (1998); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 50-57; Young, *State Sovereign Immunity*, *supra* note 27, at 57-65.

⁹⁵ Young, *State Sovereign Immunity*, *supra* note 27, at 32 (observing that, under *New York* and *Printz*, "Congress remains free to regulate private conduct howsoever it chooses; it simply cannot employ state governmental entities as instruments of that regulation").

⁹⁶ *New York v. United States*, 505 U.S. 144, 166 (1992) (emphasis added).

The “clear statement” cases pose a more interesting problem. These decisions have developed canons of statutory construction that, in cases of statutory ambiguity, disfavor readings of federal statutes that would intrude on state sovereignty. The Court has imposed clear statement rules where federal laws, *inter alia*, press the limits of Congress’s Commerce Clause authority,⁹⁷ intrude on areas of traditional state functions,⁹⁸ preempt state regulatory authority,⁹⁹ abrogate state sovereign immunity,¹⁰⁰ or impose conditions on grants of federal funds.¹⁰¹ To an extent, some of these cases recall the earlier dual federalism jurisprudence. The clear statement rule of *Gregory v. Ashcroft*, for example, seems to apply in precisely the same situations as the *National League of Cities* rule would have covered;¹⁰² for this reason, it requires the courts to define a substantive sphere of state autonomy in much the same way that the earlier doctrine did.¹⁰³ Similarly, the presumption against preemption is frequently, but not always, described as being confined to “field[s] which the States have traditionally occupied.”¹⁰⁴

The clear statement idea is distinct from dual federalism, however, in two critical respects. First, its application need not be defined in terms of a protected sphere of state autonomy. The immunity clear statement rules,¹⁰⁵ for instance, are triggered simply by the assertion that Congress has subjected the states to liability under the federal regulatory scheme. Similarly, the requirements that Congress must clearly articulate its intent to rely on its

⁹⁷ *Jones v. United States*, 120 S. Ct. 1904, 1909-11 (2000). See *Solid Waste Agency of Northern Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 159-162 (2001), *United States v. Bass*, 404 U.S. 336 (1971).

⁹⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 459-61 (1991).

⁹⁹ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-40 (1985).

¹⁰⁰ *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). This rule, unlike most of the others, predates any “federalist revival.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁰¹ *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 16-17 (1981). On the clear statement cases generally, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

¹⁰² Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1973 (1994) (arguing that “*Gregory* fell back on a concept of a protected sphere of state activity similar to the one contemplated by *National League*”); see also Bednar & Eskridge, *supra* note 57, at 1456-57 (commenting that “what the Court giveth in constitutional interpretation, it can taketh away through statutory interpretation”).

¹⁰³ Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1606-07 (2000) [hereinafter Young, *Constitutional Avoidance*].

¹⁰⁴ *Rice*, 331 U.S. at 230; see also *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm’n*, 461 U.S. 190, 206 (1983); *Jones v. Rath Packing Co.*, 430 U.S. 519, 544-45 (1977). But see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (suggesting that the presumption applies “[i]n all pre-emption cases”) (emphasis added).

¹⁰⁵ See, e.g., *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1866 (2000) (applying the “longstanding interpretive presumption that ‘person’ does not include the sovereign” in holding that the False Claims Act’s reference to “any person” did not cover state governments); *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) (applying the same rule in holding that 42 U.S.C. § 1983’s reference to “persons” did not cover state governments); *Dellmuth v. Muth*, 491 U.S. 223, 223 (1989) (holding that Congress’s intent to abrogate state sovereign immunity must be “unmistakably clear in the language of the statute”); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (same).

power to enforce the Reconstruction Amendments,¹⁰⁶ and must clearly state any conditions imposed on the receipt of federal funds,¹⁰⁷ are triggered by Congress's invocation of a particular power—not by intrusion on any particular area of state authority. I will argue in Part III that the presumption against preemption also works best when it is triggered simply by a potential conflict with state law, rather than limited to particular enclaves of state regulatory concern.¹⁰⁸

Even where clear statement rules are limited to particular spheres of state authority, however, they differ from dual federalism in a second important respect—that is, that clear statement rules never seek to make state authority in a particular area *exclusive*. Instead, clear statement rules function as what I have elsewhere called “resistance norms”—doctrinal tools that make certain sorts of governmental action more difficult, but not impossible.¹⁰⁹ By requiring that Congress be more explicit than usual in order to intrude upon state authority, clear statement rules may increase the political costs of certain kinds of legislation, either by increasing the salience of controversial federalism issues or simply by adding another hoop through which lawmakers must jump.¹¹⁰ But by directly undertaking to mediate between state and federal authority operating within the same regulatory sphere, the clear statement approach embraces the modern reality of concurrent power.

That is not to say that the line-drawing problems identified previously are non-existent. Where clear statement rules are triggered by federal intrusion into a particular sphere of state authority, they are vulnerable to the most important traditional criticism of dual-federalism—that is, that “spheres” of authority inevitably overlap. Part III thus criticizes the Court's recent foreign affairs decisions on the ground that they apply different interpretive rules to federal/state conflicts, depending upon whether the context can be classified as “foreign” or “domestic” in nature. But where line-drawing is unavoidable—such as *Gregory's* protection of the autonomy of traditional state governmental functions—clear statement rules at least have the virtue of reducing the stakes. After all, Congress can still reassert its authority by speaking clearly, even if the Court applies the clear statement rule too broadly.¹¹¹ Thus, while we ought to avoid talk of “spheres” altogether where we can, the clear statement approach is preferable to categorical exclusions of either federal or state authority.

¹⁰⁶ See *Gregory v. Ashcroft*, 501 U.S. 203 (1991).

¹⁰⁷ See *South Dakota v. Dole*, 483 U.S. 203 (1987); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁰⁸ See *infra* Part III. B.

¹⁰⁹ Young, *Constitutional Avoidance*, *supra* note 103, at 1593-99.

¹¹⁰ *Id.* at 1596-98; Bednar & Eskridge, *supra* note 57, at 1487; see also Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 809 (1996) [hereinafter Althouse, *Enforcing Federalism*] (noting that “one could characterize *Gregory* as an extension of *Garcia's* reliance on the political safeguards of federalism”).

¹¹¹ Young, *Constitutional Avoidance*, *supra* note 103, at 1597; Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1006-07 (1993) (arguing that line-drawing is less critical under *Gregory's* clear statement rule than it was under *National League of Cities*).

B. "Power Federalism": The Commerce Clause and Section Five Cases

The two doctrinal currents that remain, the Court's efforts to limit the scope of Congress's power under the Commerce Clause and Section Five of the Fourteenth Amendment, fall into a category that I have described elsewhere as "power federalism."¹¹² Unlike "process federalism," a category that includes the "clear statement" cases discussed above, "power federalism" bars the federal government from doing certain things regardless of the procedural hurdles that it is able to surmount.¹¹³ And unlike "immunity federalism," a category typified, but not limited to the Court's state sovereign immunity jurisprudence,¹¹⁴ "power federalism" doctrines are concerned with the allocation of power to *govern*, that is, to regulate private conduct and provide benefits to private citizens.¹¹⁵ Dual federalism, in most of its incarnations, has been a form of power federalism because it is not a function of lawmaking process and is concerned with regulatory jurisdiction over private entities.¹¹⁶ I hope to show in this section, however, that dual federalism is not the *only* form of power federalism.

It is the Commerce Clause cases, because of their doctrinal relationship to the pre-1937 decisions, that most directly invoke the memory of dual federalism. Peter Shane, for example, has characterized *United States v. Lopez* as "resurrect[ing] the notion that there is a discrete category of activity that, even if it affects interstate commerce, may not be regulated pursuant to Congress' commerce power unless a court independently determines that the effects on commerce are substantial enough to justify national legislation."¹¹⁷ Furthermore, some of the Court's more recent language in *United States v. Morrison* strongly suggests an enclave approach. "The Constitution," Chief Justice Rehnquist wrote, "requires a distinction between what is truly national and what is truly local."¹¹⁸ He explained that

[i]n recognizing this fact we preserve one of the few principles that has been consistent since the [Commerce] Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States. Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States,

¹¹² Young, *State Sovereign Immunity*, *supra* note 27, at 26-29.

¹¹³ *Id.* at 29.

¹¹⁴ *Id.* at 29-31.

¹¹⁵ *Id.* at 26-29. I have argued that the anti-commandeering doctrine combines elements of both immunity and process federalism. *Id.* at 32-34.

¹¹⁶ The stunted form of dual federalism articulated in *National League of Cities* is an exception, as that doctrine aimed only at exempting state governments themselves from the scope of federal regulatory rules. *National League of Cities* was thus a form of immunity federalism. *Id.* at 31-32. I will also argue in Part III that preemption doctrine—generally a form of process federalism because it concerns only the degree of clarity with which Congress must speak before supplanting state law—can partake of the vices of dual federalism when the relevant rules are defined by reference to distinct "spheres" of regulation. *Infra* text accompanying notes 245-46.

¹¹⁷ Shane, *supra* note 3, at 209.

¹¹⁸ *United States v. Morrison*, 529 U.S. 598, 617 (2000) (citing *United States v. Lopez*, 514 U.S. 549, 568 (1995)).

than the suppression of violent crime and vindication of its victims.¹¹⁹

With such language in the opinion, it is hardly surprising that Justice Souter read the majority to conclude “that some particular categories of subject matter are . . . presumptively beyond the reach of the commerce power.”¹²⁰

Although the identification of *Lopez* and *Morrison* with dual federalism is understandable, in my view it emphasizes the Court’s rhetoric over the doctrinal formulations that are, in fact, doing the work in both cases. *Lopez* emphasized three specific shortcomings of the federal Gun-Free School Zones Act: Congress had made no findings concerning the impact of guns in schools on interstate commerce; the statute contained no jurisdictional element requiring the prosecution to prove some sort of nexus to interstate commerce; and the activity being regulated—possession of firearms—was not itself commercial in nature.¹²¹ The findings requirement is a form of process federalism, requiring Congress to deliberate about the federalism implications of its actions without imposing any substantive criteria on their ultimate decision.¹²² Similarly, the jurisdictional element idea seems also to promote process values by requiring Congress to add a largely symbolic element to the statute, and by requiring prosecutors and juries to consider some aspect of federalism as a component of their responsibilities. Neither, in any event, comes close to suggesting that state governments have exclusive authority over any particular subject matter.¹²³

The third criterion, that Congress may regulate only “commercial” or “economic” activity, emerged as the primary consideration last Term in *United States v. Morrison*. As Justice Souter’s dissent emphasized, Congress supported the Violence Against Women Act¹²⁴ with a “mountain of data assembled . . . showing the effects of violence against women on interstate commerce,” as well as specific findings in the House, Senate, and Conference reports on the legislation.¹²⁵ The Court’s majority, however, was unimpressed, noting that “the existence of congressional findings is not sufficient,

¹¹⁹ *Id.* (citation omitted).

¹²⁰ *Id.* at 638 (Souter, J., dissenting).

¹²¹ *Lopez*, 514 U.S. at 561-63.

¹²² Young, *State Sovereign Immunity*, *supra* note 27, at 24-25. For a critique of findings requirements generally, see A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001). ARTICLES EDITOR: PLEASE CHECK FOR THIS CITE BEFORE SENDING TO AUTHOR}

¹²³ Justice Kennedy’s important concurrence in *Lopez* asked “whether the exercise of national power seeks to intrude upon an area of traditional state concern.” *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). But this consideration was not dispositive, as it would have been under dual federalism. Rather, it was to be considered in conjunction with other “factors,” such as the “commercial character” of the regulated activity and the ability of the states to serve as “laboratories of democracy” in addressing the problem. See *id.*; see also Althouse, *Enforcing Federalism*, *supra* note 110, at 801-04 (discussing Justice Kennedy’s reasoning); Fried, *supra* note 75 at 43-45 (noting that, to the extent that Justice Kennedy proposed a return to enclaves, the majority stopped well short of that).

¹²⁴ 42 U.S.C. § 13981 (1994).

¹²⁵ *Morrison*, 529 U.S. at 628 (Souter, J., dissenting); *id.* at 631-36 (canvassing the specific findings).

by itself, to sustain the constitutionality of Commerce Clause legislation.”¹²⁶ The problem here, Chief Justice Rehnquist explained, was that the findings “rel[ie]d” so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution’s enumeration of powers—that is, the tracing of a “but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States’ police power) to every attenuated effect upon interstate commerce.”¹²⁷ In other words, the Court is willing to tolerate a long causal chain from regulated activity to interstate commerce (and to apply *Wickard v. Filburn*’s “aggregation principle”) if and only if the chain *begins* with commercial or economic activity. “While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases,” the Chief Justice wrote, “thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.”¹²⁸

The Court’s commercial/noncommercial analysis in *Morrison* and *Lopez* marks an important shift from pre-1937 efforts to limit the Commerce Power. First and foremost, the Court seems to treat “commerce” as indivisible; there is no effort to divide “intra-” from “inter-state” commerce.¹²⁹ In fact, the Court’s attention to where the causal chain *starts*—i.e., with whether the regulated activity is itself “commercial” or “non-commercial”—seems to stem from the Court’s reluctance to attempt to draw lines at any later point in the chain of economic interactions. Whatever else might be wrong with the Court’s new approach, this acceptance of an integrated national market suggests that it is more than merely a “backward glance” to the *Lochner* era.¹³⁰

The Court’s test accords broad scope to Congress’s power in two additional ways. First, “commercial” activity is generously defined. In a recent dormant Commerce Clause case, for example, the Court held the distinction between for-profit and non-profit activities irrelevant to Commerce Clause analysis.¹³¹ And the Court has done nothing to question the venerable understanding, made clear in *Gibbons v. Ogden*, that “commerce” includes not only buying and selling, but also navigation and travel.¹³² Second, the Court’s references to “economic activity” rather than “commerce” *per se* seems designed to accommodate *Wickard v. Filburn*’s principle that activities that are *usually* commercial do not evade Congress’s regulatory power simply

¹²⁶ *Id.* at 613-14.

¹²⁷ *Id.*

¹²⁸ *Id.* at 612.

¹²⁹ See, e.g., Fried, *supra* note 75, at 37-38. For this reason, commonplace accusations that “the commercial/noncommercial distinction recalls the failed, formulaic line-drawing of cases like *Hammer v. Dagenhart*, *Schechter Poultry*, and *Carter Coal*,” Moulton, *supra* note 3, miss important differences between *Lopez* and *Morrison* and the pre-1937 case law.

¹³⁰ Compare *United States v. Lopez*, 514 U.S. 548, 608 (Souter, J., dissenting).

¹³¹ *Camps Newfoundland/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583-88 (1997).

¹³² See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189-90 (1824). Indeed, the *Morrison* Court specifically noted that other portions of the Violence Against Women Act that punished abusers who crossed state lines, see 18 U.S.C. § 2261(a)(1) (1994), had been uniformly upheld by courts of appeals applying *Lopez*. *Morrison*, 529 U.S. 613 n.5.

because some particular instances of that activity are not commercial.¹³³ Taken together, the Court's acceptance of a national market, broad definition of "commercial" activity, and willingness to permit incidental regulation of non-commercial activity assures that Congress's Commerce Power remains broad indeed.¹³⁴

One might still ask, however, whether the Court's effort to place even a small sphere of activity "off limits" to federal regulation signals a return to the sins of dual federalism. On the face of it, the Court seems to have isolated one sphere—"commercial" or "economic" activity—for federal regulation, while reserving another sphere—"noncommercial" or "noneconomic" activity—for the states.¹³⁵ The federal sphere, of course, is not exclusive; state regulation of interstate commerce is unconstitutional only if it is discriminatory or very burdensome.¹³⁶ But is this *state* sphere protected in *Lopez* and *Morrison* really a "sphere" at all? It is certainly unlike the subject matter categories that we generally identify with dual federalism. While the Court's rhetoric strongly suggested a distinction between "commerce" and "criminal law," the Court's decision a week later in *Jones v. United States* made clear that many forms of arson—"a paradigmatic common-law state

¹³³ See also Althouse, *Enforcing Federalism*, *supra* note 110, at 796 (observing that "Filburn, even if he did not sell the wheat he grew, was nevertheless conducting the commercial enterprise of farming"). I suspect that, if the point were pressed, the Court would fall back on a proportionality analysis similar to that applied in *City of Boerne v. Flores*, 521 U.S. 507 (1997). There, the Court held that Congress's power to enforce the Reconstruction Amendments allows it to regulate activity that may not be unconstitutional in particular instances, so long as the number of cases in which the activity *would* be unconstitutional is large in proportion to the cases in which it would not be. See *id.* at 530-33; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 746 (1998). Although *Lopez* and *Morrison* did not explore the point, I suspect the current Court would view *Wickard* differently if it appeared that the federal regulatory scheme had been directed *primarily* at circumstances in which the crop was grown for home consumption.

One might also explain *Wickard* as an application of the principle, traceable to the *Shreveport Rate Cases*, that Congress may regulate aspects of conduct that would ordinarily be off limits if such regulation is necessary to regulate the aspects of that conduct that *do* fall within Congress's regulatory jurisdiction. See *Houston, E. & W. Texas Ry. v. United States*, 234 U.S. 342 (1914). The *Shreveport Rate Cases*, decided during the heyday of restrictive Commerce Clause jurisprudence, held that Congress could regulate *intrastate* railroad rates if such regulation was necessary in order to effectively regulate *interstate* rates. See *id.* at 353. Similarly, one could read *Wickard* as holding that Congress may regulate wheat *not* sold on the open market (i.e., noncommercial conduct) because such regulation is necessary to prevent such wheat from having an impact on prices for wheat that *is* sold. *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) (noting that wheat grown for home consumption "overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases").

¹³⁴ See, e.g., Fried, *supra* note 75, at 37 (concluding that *Lopez* "was at once a modest and a conscientious exercise of the Court's power" to limit Congress's authority); see also Young, *Two Cheers for Process Federalism*, *supra* note 67 (manuscript Part II.A.) (comparing the narrow power denied to Congress in *Lopez* with the broad powers employed in several recent preemption cases).

¹³⁵ Althouse, *Enforcing Federalism*, *supra* note 110, at 811 (stating that, after *Lopez*, "the states will now have judicially enforceable autonomy to legislate in certain areas"); Lessig, *supra* note 70, at 205-06 (suggesting that commercial/noncommercial ultimately will devolve into the old enclaves).

¹³⁶ E.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

crime”—remain within the reach of the federal commerce power.¹³⁷ Similarly, although the *Morrison* Court expressed some desire to cordon off “family law” as a protected sphere of non-commercial activity,¹³⁸ it seems clear that federal child custody and domestic violence legislation that regulates cross-jurisdictional aspects of family law would survive constitutional scrutiny under current doctrine.¹³⁹ Given the Court’s recent holding that nonprofit activities are still “commercial” for purposes of the Commerce Clause, it is hard to think of any area of substantive regulatory policy that the *Lopez/Morrison* commercial/non-commercial distinction would place entirely off limits to federal intervention.

As I have discussed, the pre-1937 Court dealt with this problem of overlap by reviewing for legislative purpose: Measures that were meant to express a federal policy concerning labor regulation, for example, were unconstitutional, even if the means employed was purely regulation of interstate commerce.¹⁴⁰ But the current Court has made no move whatsoever in this direction. Such a move seems unlikely, moreover, in light of the Court’s Spending Clause jurisprudence, which has practically invited Congress to use conditional spending as a hook to achieve its substantive policy goals where direct regulation is beyond Congress’s power.¹⁴¹ And the Court has never questioned *Katzenbach v. McClung* or *Heart of Atlanta Motel*, each of which permitted Congress to use the commercial nature of the transactions involved as a lever to regulate private discrimination in public accommodations.¹⁴²

If the Commerce Clause cases do not signify the return of dual federalism, what about the last of our five doctrinal currents—the Court’s even more aggressive efforts to limit the scope of Congress’s power to enforce the Reconstruction Amendments? The second half of the Court’s opinion in *Morrison*, which was concerned with Congress’s alternative effort to ground the Violence Against Women Act in Section Five of the Fourteenth Amend-

¹³⁷ *Jones v. United States*, 120 S. Ct. 1904, 1912 (2000) (holding that the federal arson statute should be construed as limited to buildings used for commercial purposes, in order to avoid constitutional doubts under *Lopez* as to Congress’s authority to reach non-commercial property). Only Justices Thomas and Scalia suggested any doubt concerning Congress’s authority to protect “all buildings used for commercial activities.” *Id.* at 1913 (Thomas, J., concurring).

¹³⁸ *United States v. Morrison*, 529 U.S. 598, 616 (2000).

¹³⁹ Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994) (extending full faith and credit to child custody determinations); Safe Homes for Women Act of 1994, 18 U.S.C. §§ 2261-2266 (1994) (making domestic violence a federal crime when the offender crosses state lines); see generally Dailey, *supra* note 57, at 1788-89 (observing that “family law [has] emerged in recent years as an important arena of national interest, increasingly governed by national legislation and increasingly presided over by federal courts” (footnote omitted)).

¹⁴⁰ *Supra* text accompanying notes 49-56.

¹⁴¹ E.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Baker*, *supra* note 80, at 1914; *Jackson*, *supra* note 2, at 2211-12 (noting that the Court has not yet imposed any meaningful limits on conditional spending); see also *Alden v. Maine*, 119 S. Ct. 2240 (1999) (pointing out that, while Congress could not abrogate the state’s sovereign immunity directly, it retained the power to induce a waiver as a condition of receipt of federal funds).

¹⁴² *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (reaffirming these precedents); see *supra* text accompanying notes 75-83 (discussing *McClung* and *Heart of Atlanta Motel*).

ment, suggests a different sort of subject-matter limit on Congress's power.¹⁴³ Relying upon the *Civil Rights Cases*,¹⁴⁴ the Court held that Congress may not use the Section Five power to regulate private activity that does not involve state action.¹⁴⁵ The state action requirement has been thought to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power."¹⁴⁶ In many or most cases, the requirement actually protects state regulatory authority rather than individual freedom; although the requirement exempts individuals from the strictures of the federal Constitution itself as well as Congress's Section Five power, most private conduct remains subject to state regulation.¹⁴⁷

This state sphere could hardly be exclusive, of course, so long as other powers—like the commerce power—enable Congress to regulate some forms of private discrimination.¹⁴⁸ The same can be said of the Court's other recent Section Five cases, which have rested not on the state action requirement itself but instead on a narrow view of Congress's remedial powers even when state action is involved.¹⁴⁹ In many of these cases, Congress clearly has power to regulate the state action at issue under the Commerce Clause or some other Article I provision; the Section Five issue arises only because Congress also wants to override state sovereign immunity—a power that Congress possesses when it acts under Section Five but not when it acts under Article I.¹⁵⁰ And *City of Boerne*, which was *not* an Eleventh Amendment case, did not suggest that "state regulation of religion" is an exclusive enclave of state authority.¹⁵¹ A new federal statute passed to protect religious groups from disadvantageous local zoning practices, for example, relies

¹⁴³ *Morrison*, 529 U.S. at 617-28.{AE: CITE THE WHOLE SECTION 5 DISCUSSION}

¹⁴⁴ 109 U.S. 3 (1883).

¹⁴⁵ *Morrison*, 529 U.S. at 621-24.

¹⁴⁶ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

¹⁴⁷ E.g., PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 295-96 (4th ed. 2000) (noting that the state action doctrine's "protection extends only against federal regulation; state antidiscrimination regulation is presumptively legitimate," and that "the *Civil Rights Cases* can be viewed as emphasizing the minimal role of the national government as a guarantor of 'personal' rights and liberties").

¹⁴⁸ *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

¹⁴⁹ *Board of Trustees of the Univ. of Alabama v. Garrett*, 121 S. Ct. 955 (2001) (holding that Title I of the Americans with Disabilities Act was not valid Section Five legislation); *Kimel v. Fla. Bd. of Regents*, 120 S. Ct. 631, 640-50 (2000) (holding that Congress could not ban age discrimination by state governments pursuant to its Section Five powers); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act, which barred activities by state governments that burden religion, was an illegitimate attempt by Congress to redefine the content of federal constitutional provisions).

¹⁵⁰ *Garrett*, 121 S.Ct. 955 (discrimination against the disabled in employment); *Kimel*, 120 S. Ct. 631 (age discrimination in employment); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (regulation of patents and trademarks).

¹⁵¹ The Government defended the Religious Freedom Restoration Act in *City of Boerne* almost exclusively on Section Five grounds, presumably because it thought that religious free exercise could not plausibly be characterized as "commerce." Brief for the United States at 35 n.38, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074) (mentioning the Commerce Clause only in a footnote, and only in an "as applied" capacity).

on no less than three different federal legislative powers in reaching different aspects of those practices.

Even taking the Section Five power in isolation, the Court has made clear that Congress may protect “liberty” or “property” in any number of diverse regulatory fields.¹⁵² In light of the Court’s recent decision protecting parental rights against state grandparent visitation statutes,¹⁵³ for example, it seems clear that Congress could pass a law preempting such statutes—despite the Court’s general solicitude for state jurisdiction over family law. Just as the Constitution itself reaches into virtually all areas of American law, so, too, Congress’s power to enforce the Constitution under Section Five¹⁵⁴ may also reach into a wide variety of regulatory fields, even if it may only reach certain kinds of activity within those fields. The result is much like the Commerce Clause regime of *Lopez* and *Morrison*—federal power reaches some, but certainly not all, activities in almost any conceivable area of regulatory concern.

C. *The Value of a Concurrent but Limited Commerce Clause*

Some commentators have acknowledged the difference between the Court’s present approach to federalism and the enclaves of the past, while still expressing skepticism about the overall enterprise of judicial review in this area. Larry Kramer, for example, has observed that:

Theoretically, it may be possible for the Court to replace rigid lines that establish a fixed domain of exclusive state jurisdiction with more fluid tests that turn on some notion of functionality. But governing a modern society is much too complicated for the Court’s preferences about where or how to draw the line to inspire much confidence.¹⁵⁵

There are, it seems to me, really two questions here. First, do we have “confidence” in the judiciary’s ability to draw sensible lines that do not unduly constrict federal regulatory authority or simply reflect the judges’ personal preferences?¹⁵⁶ That is a large and important debate, but one that I do not want to pursue here. Second, even if such lines can be drawn, we might sensibly ask *why* we should draw them? If the Court’s new doctrine does *not*

¹⁵² *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2208 (1999) (noting that Congress may protect patents under the Section Five power); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2224 (1999) (suggesting that some property interests under the federal trademark laws would be protectable under Section Five).

¹⁵³ *Troxel v. Granville*, 120 S. Ct. 2054 (2000).

¹⁵⁴ Although Section Five technically confers power only to enforce the provisions of the Fourteenth Amendment, *City of Boerne*’s holding that this power covers all rights *incorporated* into that Amendment via the Due Process Clause, see *City of Boerne*, 521 U.S. at 519, makes it hard to imagine too many aspects of the Constitution that Congress could not enforce under Section Five.

¹⁵⁵ Kramer, *supra* note 81, at 289.

¹⁵⁶ *United States v. Morrison*, 529 U.S. 598, 653-55 (2000) (Souter, J., dissenting); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 119 S. Ct. 2219, 2239 (1999) (Breyer, J., dissenting) (arguing that “courts cannot easily draw the proper basic lines of authority” without unduly constricting legislative flexibility).

attempt to revive dual federalism's notion of exclusive spheres of state regulatory authority—that is, it permits federal intervention into any field of regulation that one can think of—then what good is it?

The question is a serious one. Played out to its logical conclusion, the Court's Commerce Clause jurisprudence would create a crazy quilt in many areas of regulation, with the federal government regulating the "commercial" aspects of the underlying activity and the states continuing to control the "noncommercial" aspects. Why, for example, should an arsonist who burns down a convenience store and the house next door to it be prosecuted by federal authorities for the destruction of the former and by state authorities for the latter?¹⁵⁷ It is not obvious how such a regulatory structure would serve any of the values generally associated with federalism, or why the Framers of the Constitution could possibly have wanted such a regime.¹⁵⁸

This concern has led some thoughtful proponents of judicially-enforceable federalism to reject the Court's commercial/noncommercial distinction as unsatisfying. Ann Althouse, for example, has argued that:

We should begin a reconstruction of Commerce Clause jurisprudence that looks deeply into why it is good for some matters to be governed by a uniform federal standard, why it is good for some things to remain under the control of the various states, and what effect these choices will have on the federal courts.¹⁵⁹

Similarly, Donald Regan has argued that the Court should uphold federal Commerce Clause legislation so long as it is designed to address collective action problems or other difficulties that render independent state initiatives inadequate to address a given problem.¹⁶⁰

Such approaches have the obvious advantage that they dovetail with the reasons for *having* a federalist regime in the first place. But for that very reason, these approaches turn on much more overtly political judgments than the relatively formalist exercise of classifying a regulated activity as "commercial" or not.¹⁶¹ The commercial/noncommercial distinction is hardly a bright-line rule, but it does seem to leave less room for judicial discretion than a determination whether federal action is really "necessary." It seems likely, moreover, that federal legislators frequently view state regulation as inadequate not because it cannot work, but because state officials rather than

¹⁵⁷ Cf. *Jones v. United States*, 120 S. Ct. 1904 (2000).

¹⁵⁸ But see Evan H. Caminker, *Context and Complementarity within Federalism Doctrine*, 22 HARV. J.L. & PUB. POL'Y 161, 162-63 (1998) ("It would be unreasonable to demand of the Supreme Court that every single doctrinal rule perfectly balance the underlying federalism values.").

¹⁵⁹ Althouse, *Enforcing Federalism*, *supra* note 110, at 817.

¹⁶⁰ Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554, 555 (1995); Stephen A. Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 831-38 (1996) (advancing a similar proposal and linking it to the concept of "subsidiarity" in the European Union).

¹⁶¹ Lessig, *supra* note 70, at 197 ("Realist limits can never effect effective judicial limits on governmental power If limits are to be found . . . they will be made only with the tools of a sophisticated formalism."). Professor Lessig views the commercial/noncommercial distinction as a realist one, *id.* at 196-97; I disagree with that conclusion for the reasons stated in the text.

federal representatives will receive the credit.¹⁶² If that is true, then any standard that requires Congress to show a unique need for a federal response to a given problem will likely end up striking down far more federal statutes than the Court's commercial/noncommercial distinction. For all these reasons, approaches defined in terms of federalism's underlying values seem likely to trigger even more difficult questions of judicial legitimacy than the Court's current formula.¹⁶³

In light of these concerns, I view the Court's commercial/noncommercial distinction as a plausible "second best" solution. Although my conclusions on this point are necessarily tentative, the Court's approach seems to serve two beneficial functions. First, I think the notion that the Court's decisions serve a "cueing" function for Congress¹⁶⁴—a notion popular among academics after *Lopez*,¹⁶⁵ probably less popular after *Morrison*—still holds some truth. The fact that the Violence Against Women Act was politically visible in a way that the Gun-Free School Zones Act was not should not obscure the fact that each was peripheral to the federal regulatory project.¹⁶⁶ *Lopez* and *Morrison* were both decisions about whether the commerce power should have any limiting principle *at all*—not about whether the Court should impose a significant substantive limit on Congress's authority. In both cases, the Court argued that to uphold the statute before it would leave nothing beyond the reach of Congress's power.¹⁶⁷ To uphold the statute, in other words, would have told Congress that the limits on its authority are "solely a matter of legislative grace."¹⁶⁸

That message strikes me as fundamentally counterproductive, *especially* if one concedes that the primary limits on federal authority are political in nature. One need not go all the way with Herbert Wechsler or his more recent apostles to recognize that the sporadic nature of judicial review, the Court's limited political capital, and the difficulty of framing and applying meaningful doctrinal constraints on federal authority all conspire to produce

¹⁶² Althouse, *Enforcing Federalism*, *supra* note 110, at 812 (characterizing the Gun-Free School Zones Act, struck down in *Lopez*, in this way).

¹⁶³ *United States v. Lopez*, 514 U.S. 549, 611 (1995) (Souter, J., dissenting) (expressing concern that the Court's enforcement of Commerce Clause limits will "inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago"); Moulton, *supra* note 3, at 915 (arguing that trying to incorporate the values of federalism into a doctrinal test would introduce "enormously complex and quite contestable" empirical and normative questions).

¹⁶⁴ PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 191-95 (1982) (discussing *National League of Cities* from this perspective).

¹⁶⁵ *E.g.*, Bednar & Eskridge, *supra* note 57, at 1484.

¹⁶⁶ Even Justice Souter seemed skeptical about the VAWA's practical importance. See *United States v. Morrison*, 529 U.S. 598, 636 n.10 (2000) (Souter, J., dissenting) ("I and other Members of this Court appearing before Congress have repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility and may deal with today if they have the will to do so.").

¹⁶⁷ *Morrison*, 529 U.S. at 615-16; *United States v. Lopez*, 514 U.S. 549, 564 (1995); see also *Morrison*, 529 U.S. at 645-52 (Souter, J., dissenting) (asserting frankly that the only limits on Congress's authority are political).

¹⁶⁸ *Morrison*, 529 U.S. at 615-16.

a situation in which, *most of the time*, political decisions will control the balance of authority between state and nation.¹⁶⁹ In that situation, the maintenance of enforceable but none-too-constraining limits on federal authority force the political branches to contemplate the limits of their power before they act. As my colleague Douglas Laycock has observed, “[t]he federalism cases . . . have already changed the way the federal government works. At the very least, vast amounts of effort are expended in the other two branches trying to figure out the limits of these cases and how to work within them or around them.”¹⁷⁰ It seems highly doubtful to me—although I have no idea how one might prove this empirically—that the political branches would undertake equivalent deliberation on federalism issues if *some* threat of judicial invalidation were not looming in the background.¹⁷¹

Second, I suspect the Court’s decisions perform the valuable function of ensuring that concurrent regulatory jurisdiction remains, in fact, concurrent. Many areas of regulation, of course, will pervasively involve commercial transactions or the channels and instrumentalities of interstate commerce, and in these Congress remains free to oust state regulation entirely. But other areas—family law, gun control, criminal law, education, for example—will feature both commercial and noncommercial aspects. In these areas, the Court’s current doctrine will allow significant federal input without permitting outright field preemption. Of course, the commercial/noncommercial line may not be the most efficient or effective way to divide authority. The mere necessity of *some* division, however, may encourage Congress and the states to negotiate more rational allocations of authority within the broad confines prescribed by the Court—allocations that might not occur at all were the option of field preemption available.¹⁷²

Whether the Court’s current Commerce Clause doctrine will produce or at least encourage a rational division of authority is a complicated question that I cannot resolve here. My primary purpose is simply to show that the

¹⁶⁹ *United States v. Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring) (recognizing that federalism is still primarily dependent on the political process, but insisting on a judicial role as well); *TRIBE*, *supra* note 60, § 5-11, at 865 (recognizing that some “substantive and/or structural limits on the powers of Congress are necessary,” but that “Congress is generally the most appropriate body to determine the relative allocation of powers between the national and state governments”).

¹⁷⁰ Posting of Douglas Laycock, posting to CONLAWPROF@listserv.ucla.edu (Aug. 1, 2000) (quoted with permission).

¹⁷¹ Althouse, *Enforcing Federalism*, *supra* note 110, at 803 (noting that “[a] little uncertainty about whether the Court might strike down a statute gives Congress an incentive to perform this role” of safeguarding federalism politically).

¹⁷² One might think, following the Coase Theorem, that the initial allocation of authority between the states and the federal government would not affect the ultimate ability of the system to reach an efficient distribution of functions through bargaining. Daniel A. Farber, *The Coase Theorem and the Eleventh Amendment*, 13 CONST. COMMENT. 141 (1996). The transaction costs which impede such bargaining may be reduced, however, by placing the initial allocation of rights with the state governments, because it is easier for the unitary federal government to offer a uniform “bribe” to state governments than vice versa. *Id.* at 143. Moreover, allowing the federal government a monopoly of constitutional leverage in the initial allocation—by eliminating *all* constitutional constraints on federal authority—may adversely impact the ultimate bargain in much the same way that “wealth effects” distort Coasean bargains in private law.

Court's central federalism cases have acknowledged both the integration of the national market and (perhaps only implicitly) the difficulties in defining "separate spheres" of state and national authority. That is an important step. If the Court's new doctrines are mistakes, at least many of those mistakes will be new ones.

The old mistakes persist, however, in other areas that have so far been beyond the scope of the "federalist revival." I devote the remainder of this article to demonstrating the persistence of dual federalism in cases involving the interaction between state regulatory authority and foreign affairs. Ironically, the Court's error consists of an attempt to define and police an area of *federal* authority, within which the states are uniquely disabled or discouraged from acting. The difficulties are the same, however, as those that bedeviled the Court's attempts to protect exclusive enclaves of state power.

III. *Dual Federalism in Foreign Affairs*

We are in the midst of an important debate on the legitimacy of foreign affairs exceptionalism—the view that "federal regulation of foreign affairs is subject to a different, and generally more relaxed, set of constitutional restraints than federal regulation of domestic affairs."¹⁷³ Although the exceptionalist view finds support in some famous and venerable precedents,¹⁷⁴ the current debate had until recently been largely confined to academic circles.¹⁷⁵ But three decisions in the Supreme Court's last two Terms show the Court returning—if only in a very preliminary way—to the question of whether federalism rules should be different, or if they should disappear entirely, where foreign affairs are involved. Two of these decisions respond, moreover, to substantial lower court opinions staking out a more definitive position. The time thus seems ripe for assessing foreign affairs exceptionalism in the context of past and present approaches to federalism.

I begin with an argument that the Court's most recent foreign affairs preemption cases—*Crosby v. National Foreign Trade Council*¹⁷⁶ and *United States v. Locke*¹⁷⁷—apply special rules based on the cases' relationship to foreign affairs. I then argue that this and other forms of foreign affairs exceptionalism share the same critical vice that doomed dual federalism: the attempt to define and police a subject matter boundary—here, "foreign" versus "domestic"—that is increasingly under pressure from forces of economic, technological, and political integration. Finally, I conclude by analyzing the

¹⁷³ Bradley, *Treaty Power*, *supra* note 9, at 391.

¹⁷⁴ E.g., *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936); *Missouri v. Holland*, 252 U.S. 416 (1920).

¹⁷⁵ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution* (forthcoming 2001) (manuscript on file with author) [hereinafter Spiro, *Globalization*]; G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999).

¹⁷⁶ 120 S. Ct. 2288 (2000).

¹⁷⁷ 120 S. Ct. 1135 (2000).

Court's third recent foreign affairs case, *Breard v. Greene*,¹⁷⁸ as a clue to where the Court may be headed on these issues.

A. *Last Term's Foreign Affairs Preemption Cases*—Crosby and Locke

In two cases decided last Term, the Supreme Court struck down state laws as inconsistent with federal activities concerning foreign affairs. The more prominent case, *Crosby v. National Foreign Trade Council*,¹⁷⁹ dealt with trade sanctions imposed by the Commonwealth of Massachusetts on the military government of Burma.¹⁸⁰ A state law enacted in 1996 required the State's Secretary of Administration and Finance to create and maintain a "restricted purchase list" of companies doing business in Burma.¹⁸¹ Companies appearing on the list were then penalized in competing for state contracts.¹⁸² An industry group, representing companies on the state's list, challenged the law, alleging that it was unconstitutional under the dormant foreign affairs power and the dormant Foreign Commerce Clause, and also preempted under a federal statute imposing national sanctions on Burma.¹⁸³

The U.S. Court of Appeals for the First Circuit's decision in the Burma case warrants extended attention because it outlined the exceptionalist view far more starkly than Justice Souter's opinion for the Supreme Court. Judge Lynch's opinion for the First Circuit was not shy about dicta; it found the Massachusetts law unconstitutional on both the foreign affairs and foreign commerce theories, and preempted to boot.¹⁸⁴ The most far-reaching of these theories—that the state law was invalid simply for its trespass into the exclusive province of the federal "foreign affairs" power—rested on the Supreme Court's decision in *Zschernig v. Miller*.¹⁸⁵ In *Zschernig*, an Oregon probate law forbade state judges from awarding funds out of a decedent's estate to persons living in foreign countries where the inheritance would likely be subject to confiscation.¹⁸⁶ The Court found that the administration of this law required state judges to conduct an inquiry into the political and economic system of the country in question—in essence, the law invited state judges to deny inheritance to inhabitants of communist countries and, in the process, to inveigh against the evils of the communist system.¹⁸⁷ Because it determined that such behavior was likely to undermine the federal government's ability to conduct foreign policy, the Court found the Oregon law unconstitutional.¹⁸⁸

¹⁷⁸ 523 U.S. 371 (1998).

¹⁷⁹ 120 S. Ct. 2288 (2000).

¹⁸⁰ Although the junta changed the country's name to "Myanmar," the convention of the parties and courts involved in the litigation seems to have been to continue to use "Burma." *Crosby*, 120 S. Ct. at 2290 n.1.

¹⁸¹ MASS. GEN. LAWS ch. 7, § 22J(a) (1998).

¹⁸² See *id.* §§ 22G-I (1996).

¹⁸³ See *Crosby*, 120 S. Ct. at 2289. {CITECHECKER: PLEASE PROVIDE A PINCITE}

¹⁸⁴ *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom.* *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000).

¹⁸⁵ 389 U.S. 429 (1968).

¹⁸⁶ *Id.* at 430-31.

¹⁸⁷ *Id.* at 436-40.

¹⁸⁸ *Id.* at 441.

Although the Supreme Court had not had occasion to apply *Zschernig*'s "dormant Foreign Affairs power" theory since 1968, the First Circuit followed and arguably extended it. Asserting that "power over foreign affairs is vested exclusively in the federal government,"¹⁸⁹ the court of appeals read *Zschernig* to stand "for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed."¹⁹⁰ Because the state law had "more than an incidental or indirect effect on foreign relations," it was unconstitutional under *Zschernig*.¹⁹¹

Turning to the Foreign Commerce Clause, the court of appeals found the state law invalid because it facially discriminated against foreign commerce.¹⁹² Judge Lynch further reasoned that the state law "interfere[d] with the federal government's ability to speak with one voice" on foreign commerce; attempted "to regulate conduct beyond [Massachusetts's] borders and beyond the borders of this country"; and failed to promote any legitimate local interests.¹⁹³ In particular, Judge Lynch asserted that "moral concerns regarding human rights conditions abroad" cannot amount to a legitimate interest because they fall outside "traditional areas of state concern."¹⁹⁴ Finally, the court of appeals rejected the argument that the State—in deciding from whom to purchase goods and services—was not subject to the anti-discrimination rule because it was acting as a "market participant"; in fact, Judge Lynch strongly suggested (while purporting not to resolve the question) that the market participant exception should not extend to the Foreign Commerce Clause.¹⁹⁵

In case all this was not enough, the First Circuit held the state law preempted by a federal statute likewise imposing sanctions on Burma.¹⁹⁶ I will discuss the specific preemption arguments more thoroughly below in the context of the Supreme Court's decision;¹⁹⁷ the important thing about the First Circuit's holding on this issue, however, is the court's assertion that "[p]reemption will be more easily found where states legislate in areas traditionally reserved to the federal government, and in particular where state laws touch on foreign affairs."¹⁹⁸ Even more strongly, the court of appeals read Supreme Court precedent to require that "when Congress legislates in an area of foreign relations, there is a strong presumption that it intended to preempt the field, in particular where the federal legislation does not touch

¹⁸⁹ *Natsios*, 181 F.3d at 49.

¹⁹⁰ *Id.* at 52.

¹⁹¹ *Id.* at 53.

¹⁹² *Id.* at 66-68.

¹⁹³ See *id.* at 68-69 (one voice), 69-70 (extraterritorial reach), 70-71 (no legitimate local interest).

¹⁹⁴ *Id.* at 70-71.

¹⁹⁵ See *id.* at 62-66.

¹⁹⁶ *Id.* at 73-77; Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 570, 110 Stat. 3009-166 to 3009-167 (1997) (enacted in the Omnibus Consolidated Appropriations Act, § 101(c), 110 Stat. 3009-121 to 3009-172 (1997)).

¹⁹⁷ See *infra* text accompanying notes 203-24.

¹⁹⁸ *Natsios*, 181 F.3d at 73.

on a traditional area of state concern.”¹⁹⁹ Judge Lynch brushed aside the suggestion that state procurement is, in fact, a “traditional area of state concern” on the ground that here procurement was directed at “effecting change in and expressing disapproval of the current regime in Burma.”²⁰⁰

The First Circuit’s opinion in the Burma case was exceptionalist in three critical respects. First, it applied—and arguably expanded—*Zschernig*’s holding that the federal foreign affairs power has a “dormant” aspect preempting state activity that implicates other nations.²⁰¹ Second, the court of appeals treated the dormant preemption imposed by the Foreign Commerce Clause as broader than that of the domestic Commerce Clause, and strongly suggested that one of the most critical exceptions to dormant preemption in the domestic context—the market participant exception—would not apply in cases implicating foreign affairs. Finally, Judge Lynch’s opinion discarded the traditional presumption against preemption that applies in domestic cases, and in fact applied a strong *reverse* presumption in favor of preemption to cases involving foreign affairs.

Justice Souter’s opinion on *certiorari* was far more judicious in its scope; it specifically refused, for example, to consider the dormant foreign affairs and foreign commerce challenges to the Massachusetts law.²⁰² Instead, the Supreme Court affirmed on grounds of preemption alone, finding that

the state law undermines the intended purpose and “natural effect” of at least three provisions of the federal Act, that is, its delegation of effective discretion to the President to control economic sanctions against Burma, its limitation of sanctions solely to United States persons and new investment, and its directive to the President to proceed diplomatically in developing a comprehensive, multilateral strategy towards Burma.²⁰³

Unlike the First Circuit, the Supreme Court reached this conclusion even “[a]ssuming, *arguendo*, that some presumption against preemption is appropriate.”²⁰⁴ The Court’s analysis, however, reflected strong exceptionalist influences.

The Court’s first and third grounds are similar: Both rely on Congress’s delegation of broad authority to the President concerning sanctions against Burma as belying “any suggestion that Congress intended the President’s effective voice to be obscured by state or local action.”²⁰⁵ State sanctions, Jus-

¹⁹⁹ *Id.* at 76 (construing *Hines v. Davidowitz*, 312 U.S. 52 (1941)). On the significance of *Hines*, see *infra* note 245.

²⁰⁰ *Natsios*, 181 F.3d at 74.

²⁰¹ For a comprehensive critique of the *Zschernig* doctrine and broad readings of the dormant Foreign Commerce Clause, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997).

²⁰² *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2294-95 n.8 (2000).

²⁰³ *Id.* at 2294. In finding conflict preemption, the Supreme Court specifically “decline[d] to speak to field preemption as a separate issue.” *Id.* at 2294-95 n.8.

²⁰⁴ *Id.* As I discuss further below, however, the Court seemed to reject a presumption against preemption in foreign affairs cases in *United States v. Locke*, 120 S. Ct. 1135 (2000). *Infra* text accompanying notes 225-41.

²⁰⁵ *Crosby*, 120 S. Ct. at 2298.

tice Souter wrote, "compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments."²⁰⁶

Such statements introduce a strong separation of powers undercurrent into what would otherwise be a case about federalism. Indeed, the willingness of generally pro-states justices, such as Chief Justice Rehnquist or Justice Scalia, to join the majority in *Crosby* may be attributable to concerns about protecting the President's primacy in foreign affairs.²⁰⁷ One could cite any number of instances in which Justices that generally support strong federalism rules have ignored those concerns in favor of executive authority.²⁰⁸

The odd thing, however, is that the Court never relies on any actual executive *act* in order to find preemption. Under current law—the correctness of which I do not challenge for present purposes—executive officials acting within the scope of their delegated authority have the power to preempt state law.²⁰⁹ In this case, senior State Department officials had testified before Congress that they found the Massachusetts sanctions an unwelcome distraction in pursuing their own, federal policy.²¹⁰ But no regulation was promulgated, no opinion letter issued, no administrative adjudication undertaken—in short, the Clinton administration had taken no formal action intended to preempt the Massachusetts law.

Why not? The administration, no doubt, did not want to take a formal position *opposing* human rights-based sanctions against Burma. As Peter Spiro has observed, "the politics of particular controversies will too often cut against disciplining a state."²¹¹ Moreover, as Professor Spiro points out, similar factors make affirmative legislative preemption difficult. "[S]tate and local measures," he writes, "will likely garner the intense support of congressional representatives from the affected jurisdictions," while other legislators "will be loath to go on record with a vote suppressing subfederal action to the benefit of foreign actors."²¹² But it is hard to agree with Spiro's

²⁰⁶ *Id.*

²⁰⁷ John Choon Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. (forthcoming 2001) (explaining *Crosby* as a case about separation of powers).

²⁰⁸ See, e.g., *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 729-33 (1999) (Scalia, J., joined by Justices Stevens, Kennedy, Souter, and Ginsburg) (deferring to federal agency interpretation of preemptive scope of federal statute, rather than applying a presumption against preemption); *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505-06 (1988) (Scalia, J., joined by Chief Justice Rehnquist and Justices White, Powell, and O'Connor) (creating federal common law defense for government contractors, to the exclusion of state tort law, in order to protect executive discretion).

²⁰⁹ E.g., *Louisiana PSC v. FCC*, 476 U.S. 355, 369 (1986); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982). Although I have no need to argue the point here, I do believe that broad powers of executive preemption raise serious constitutional problems not present when Congress does the preempting. See Young, *Two Cheers for Process Federalism*, *supra* note 67 (manuscript Part I.B.).

²¹⁰ *Crosby*, 120 S. Ct. at 2300 & nn.21-22.

²¹¹ Spiro, *Foreign Relations*, *supra* note 10, at 1253.

²¹² *Id.*; see also John M. Kline, *State and Local Boundary-Spanning Strategies in the United States: Political, Economic, and Cultural Transgovernmental Interactions*, in GLOBALIZATION AND DECENTRALIZATION, *supra* note 19 at 329, 340 (Jong S. Jun & Deil S. Wright eds., 1996) (noting that California has generally been able to mobilize sufficient congressional support to stave off preemption of its unitary tax system, despite foreign protests).

conclusion that “[t]his is hardly democracy at work.”²¹³ Indeed, if we are to take at all seriously the proposition that state prerogatives are remitted to the political process for their protection,²¹⁴ then these are *precisely* the sort of political and structural impediments to federal preemption that courts must respect. Outside the foreign affairs context, preemption requires clear and unequivocal action by some political actor in the federal government.²¹⁵ To allow the mere delegation of legislative authority to have the same effect is to transform ordinary preemption doctrine into a dormant prohibition, little different from the dormant foreign affairs and foreign commerce doctrines indulged by the First Circuit.²¹⁶

The Court’s second ground, that the state sanctions were in conflict with the federal statutory scheme itself because they “penaliz[ed] individuals and conduct that Congress has explicitly exempted or excluded from sanctions,”²¹⁷ is a more conventional preemption argument. Indeed, if the Court had relied upon this ground alone, then *Crosby* would probably not be worth talking about as an example of foreign affairs exceptionalism. But even here, the Court’s preemption analysis is sufficiently broad to call into question whether the Court is really applying a presumption against preemption. After all, in a previous opinion, Justice Souter had characterized that presumption as requiring that “[i]f the statute’s terms can be read sensibly not to have a pre-emptive effect, the presumption controls and no pre-emption may be inferred.”²¹⁸ In *Crosby*, the federal law simply set out an array of federal sanctions, with no explicit indication that those sanctions were meant to be exclusive of actions by other governmental bodies. As the Court conceded, the state and federal laws shared common goals, and it was possible for private actors to comply with both sets of rules.²¹⁹ Certainly, a non-exclusive reading of the federal statute was *possible*, and under some formulations of the presumption against preemption that would be enough to sustain the state law.

The Court, however, rejected the non-exclusive reading of the federal law, finding that “Congress’s calibrated Burma policy is a deliberate effort ‘to steer a middle path.’”²²⁰ In this situation, state “supplementation” of the

²¹³ Spiro, *Foreign Relations*, *supra* note 10, at 1254-55.

²¹⁴ *United States v. Morrison*, 529 U.S. 598, 645-53 (2000) (Souter, J., dissenting); Wechsler, *supra* note 14, at 559.

²¹⁵ *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 812-13 & n.8 (1997) (stating that Congress must make its intent to preempt state law clear); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (same); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 518 (1992) (same); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (same); *Mintz v. Baldwin*, 289 U.S. 346, 350 (1933) (same).

²¹⁶ *Cf. Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) (noting that a state’s sovereign immunity may be overcome when the United States itself brings suit, but that such a suit would “require the exercise of political responsibility for each suit prosecuted against a State”). It is also hard to see how simply requiring *some* affirmative act by either of the federal political branches would implicate separation of powers concerns about presidential powers in foreign affairs.

²¹⁷ *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2297 (2000).

²¹⁸ *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 116-17 (1992) (Souter, J., dissenting).

²¹⁹ *Crosby*, 120 S. Ct. at 2297-98.

²²⁰ *Id.* at 2297 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941)).

federal sanctions would cause the overall package to be more severe than Congress intended, disrupting “the federal decision about the right degree of pressure to employ.”²²¹ The problem is a familiar one: It is always difficult to say whether Congress’s decision to leave a gap in a regulatory scheme is really a “gap,” subject to supplementation or filling by other governmental actors, or instead an affirmative decision that something should remain unregulated.²²² Under the circumstances, the inference that Congress intended a limited menu of sanctions, no more and no less, is certainly a plausible inference to draw.²²³ But again, that inference relies upon implications from legislative *silence*, and it is hard to see how the presumption against preemption has any bite at all if silence is enough to overcome it.²²⁴

Even this less exceptionalist aspect of *Crosby*, then, seems to amount to a substantial watering-down of the presumption against preemption. That impression is confirmed by the Court’s decision, just three months before, in *United States v. Locke*.²²⁵ *Locke* held that a variety of Washington State regulations concerning oil tankers operating in Puget Sound were preempted by a federal scheme of tanker safety regulation that includes the Ports and Waterways Safety Act of 1972,²²⁶ the Oil Pollution Act of 1990,²²⁷ and various treaties and international agreements.²²⁸ While the ins and outs of these complicated regulatory schema are beyond the scope of this article, the important aspect of *Locke* for present purposes is its forthright rejection of any presumption against preemption. Rejecting prior precedent, which had ap-

²²¹ *Id.* at 2298.

²²² *E.g.*, Young, *Preemption at Sea*, *supra* note 46, at 296-97 (discussing similar problems raised by the “gap theory” in admiralty law).

²²³ The inference is undermined, however, by the fact that Congress ultimately delegated to the executive the authority to define the scope of the sanctions or even cancel them altogether. *Crosby*, 120 S. Ct. at 2292. The *executive*, of course, might choose to make the federal sanctions exclusive, but this simply collapses the Court’s second ground into its reliance on the mere fact of delegation as a demonstration of preemptive intent. As I have noted, the executive had itself taken no formal action that seemed intended to preempt sanctions by other governmental bodies. See *supra* text accompanying notes 209-10.

²²⁴ The Court confronted a similar situation in *Gade*, in which Justice Souter found the evidence of congressional intent “just as consistent with a purpose and objective to permit overlapping state and federal regulation as with one to guarantee that employers and employees would be subjected to only one regulatory regime.” *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 122 (1992) (Souter, J., dissenting). Although Justice Souter acknowledged that “[r]estriction to one such regime by precluding supplemental state regulation might or might not be desirable,” he felt that the presumption against preemption was conclusive in such situations: “[I]n the absence of any clear expression of congressional intent to pre-empt, I can only conclude that, as long as compliance with federally promulgated standards does not render obedience to Illinois’ regulations impossible, the enforcement of the state law is not prohibited by the Supremacy Clause.” *Id.* (Souter, J., dissenting).

²²⁵ 120 S. Ct. 1135 (2000).

²²⁶ 33 U.S.C. § 1223 (1994), 46 U.S.C. § 3703 (1994).

²²⁷ 33 U.S.C. § 2701 *et seq.*

²²⁸ Those agreements include the International Convention for the Safety of Life at Sea, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, the International Convention for Prevention of Pollution from Ships, 1973, 17 I.L.M. 546, and the International Convention of Standards of Training, Certification and Watchkeeping for Seafarers, with Annex, 1978, S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624.

plied the presumption in precisely the same circumstances,²²⁹ the Court held that “an ‘assumption’ of nonpreemption is not triggered when the State regulates in an area where there has been a history of significant federal presence.”²³⁰ “The state laws now in question,” Justice Kennedy explained, “bear upon national and international maritime commerce, and in this area there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”²³¹

Locke thus echoed the First Circuit’s holding in the *Burma* case that the presumption against preemption applies in certain subject-matter areas but not in others. One might ascribe the Court’s approach in *Locke* to maritime exceptionalism rather than any special treatment for foreign affairs. After all, the Court has long suggested that preemption is the rule, not the exception, in admiralty cases whether they occur in an international or domestic context.²³² It seems clear, however, that the *international* context of maritime shipping played a central role in *Locke*. As Justice Kennedy observed, “[t]he existence of the treaties and agreements on standards of shipping is of relevance, of course, for these agreements give force to the longstanding rule that the enactment of a uniform federal scheme displaces state law, and the treaties indicate Congress will have demanded national uniformity regarding maritime commerce.”²³³

Moreover, the exceptional treatment of maritime affairs in federal law may ultimately be traced to the fact that many maritime cases implicate foreign affairs.²³⁴ The Court had recently been moving away from maritime exceptionalism in cases with a more domestic cast; recent cases, for example,

²²⁹ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978). Remarkably, the Court went out of its way “to explain that the essential framework of *Ray* . . . [is] of continuing force.” *Locke*, 120 S. Ct. 1145. (One is reminded of the Court’s opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), which reaffirmed the “essential framework” of *Roe v. Wade* while changing the operative rules under *Roe* rather dramatically.) Justice Kennedy’s opinion in *Locke* took great pains to point out that *Ray*’s invocation of the presumption against preemption relied on a prior case, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), which had seemed to confine that presumption to “the historic police powers of the state.” See *Locke*, 120 S. Ct. at 1147 (discussing *Rice*, 331 U.S. at 230). Be that as it may, *Ray* did apply the presumption to exactly the same subject matter—Washington’s efforts to regulate oil tankers in Puget Sound—as was involved in *Locke*.

²³⁰ *Locke*, 120 S. Ct. at 1147.

²³¹ *Id.* at 1148.

²³² *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). On the issues surrounding maritime exceptionalism, see David Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158; DAVID ROBERTSON, ADMIRALTY AND FEDERALISM (1970); Young, *Preemption at Sea*, *supra* note 46.

²³³ *Locke*, 120 S. Ct. at 1145.

²³⁴ Alexander Hamilton, for example, defended federal admiralty jurisdiction on the ground that maritime cases “so generally depend on the laws of nations and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.” THE FEDERALIST NO. 80, at 478 (Clinton Rossiter ed., 1961). Similarly, James Madison argued for federal jurisdiction over “the exposition of treaties, . . . cases affecting ambassadors and foreign ministers,” and “admiralty and maritime cases” because “our intercourse with foreign nations will be affected by decisions of this kind.” 3 ELLIOT’S DEBATES 532 (Jonathan Elliot ed., 2d ed. 1836) (Virginia Convention).

the effect of making federal authority *exclusive* in a particular sphere, which in turn raises the stakes associated with defining and policing that sphere.²⁴³

These considerations highlight the virtues of the Supreme Court's focus on preemption in *Crosby* in comparison with the First Circuit's emphasis on *Zschemig* and the dormant Foreign Commerce Clause.²⁴⁴ But as I have argued, these virtues extend only so far. In both *Crosby* and *Locke*, the Court seems to have applied a unique kind of preemption doctrine specific to "foreign affairs" cases.²⁴⁵ That places those cases within the tradition of foreign

²⁴³ To the extent that the dormant Commerce Clause has become primarily an anti-discrimination principle in recent years, *see, e.g.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1708 (1984), it does not have a similar exclusionary effect: States can regulate as they like, so long as they treat in-staters and out-of-staters the same. All dormant Commerce Clause restrictions, moreover, can be removed when Congress consents to otherwise-prohibited state activity. *E.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). It is unclear whether the dormant foreign affairs doctrine announced in *Zschemig* is subject to any similar exception.

²⁴⁴ A *Zschemig* argument was also made (and rejected by the Ninth Circuit) in *Locke*. *See International Ass'n of Indep. Tanker Owners v. Locke*, 148 F.3d 1053, 1069 (9th Cir. 1998), *rev'd on other grounds*, *United States v. Locke*, 120 S. Ct. 1135 (2000). The tanker owners appear not to have pressed this argument in the Supreme Court.

²⁴⁵ Jack Goldsmith rejects my conclusion that *Crosby* departed from the normal rules of preemption on the ground that a "canon favoring preemption for foreign relations statutes has been around just as long as the presumption against preemption"; he thus concludes that my "conclusion that the Court watered down the presumption against preemption . . . begins from an inappropriate baseline." Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. (forthcoming) (manuscript at 32 n.160. Professor Goldsmith cites *Hines v. Davidowitz*, 312 U.S. 52 (1940), as his primary example of a well-established pro-preemption presumption in foreign affairs. *Hines* itself did not articulate such a rule explicitly, *see* 312 U.S. at 68 (noting only that "it is of importance [to the preemption inquiry] that this legislation is in a field which affects international relations"), although it has sometimes been read for that proposition, *see, e.g., Hillsborough Cty. v. Automated Medical Laboratory, Inc.*, 471 U.S. 707, 719 (1985); *Allen-Bradley Local v. Board*, 315 U.S. 740, 749 (1942).

The short answer is that my claim in this Part concerns the existence of a difference between preemption rules in foreign and domestic affairs, not whether that difference is new or of long standing. My own view is that the most blatantly exceptionalist rules—like *Zschemig* and, arguably, *Hines*—have lain largely dormant for a half-century, so that *Crosby* and *Locke* represent a troubling new turn back to the old direction. *See, e.g., Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996) (suggesting that the presumption against preemption applies "[i]n all pre-emption cases") (emphasis added); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11, 22 (2000) (arguing that "[t]he Court effectively rejected . . . a presumption in favor of preemption [in foreign affairs] in *Barclays Bank PLC v. Franchise Tax Board*, [512 U.S. 298 (1994)]"). But that point is hardly central, and I am happy to recognize that foreign affairs have always been somewhat "special." Globalization puts pressure on that specialness, because so many things now impact foreign affairs that it becomes hard to cabin "special" rules like *Zschemig* or *Hines* within manageable limits. *See infra* Part III.B.

If anything, *Hines* is a particularly vivid example of the kinship of foreign affairs exceptionalism and dual federalism. The 1940 decision in *Hines* came at the tail end of the dual federalist period of preemption doctrine, after the first invocation of a presumption against preemption but before that presumption became well established in *Rice*. *See supra* text accompanying notes 68-74; Gardbaum, *supra* note 68 at 806-07. Justice Black's opinion in *Hines* thus intones that "[t]he Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties," while "the several States of the Union exist" for "local interests." 312 U.S. at 63. It is hard to find many better examples of dual federalist rhetoric. *But see United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (quoted in text accompanying note

had refused to apply the venerable rule of *Southern Pacific Co. v. Jensen*²³⁵ that federal common law automatically displaces state law in admiralty cases.²³⁶ *Locke* thus confirms the impression left by *Crosby*: Preemption works differently in “foreign affairs” cases, with the result that state activity is given remarkably short shrift.²³⁷

It bears emphasis that the special preemption rules applied in *Crosby* and *Locke* are a far cry from *Zschemig* and other dormant prohibitions on state activity.²³⁸ A preemption regime, even if it is characterized by a presumption in favor of preemption, still requires *some* affirmative act by a federal entity in order to exclude state authority. Federal action is often difficult, and state authority will frequently benefit from federal legislative inertia.²³⁹ Moreover, preemption doctrine’s ultimate focus on congressional intent—whether tiebreaker presumptions favor or disfavor preemption in close cases—gives the political safeguards of federalism a chance to operate.²⁴⁰ Because these political and institutional checks will render federal authority over foreign affairs non-exclusive in any number of situations, the stakes in a case like *Crosby* or *Locke* are simply not as high as if the Court were purporting to define an *exclusive* zone of federal authority.²⁴¹

Dormant prohibitions, on the other hand, are far more problematic. Because they are enforced by federal courts that neither represent the states nor face Article I’s procedural gauntlet in order to act, such prohibitions evade all of these structural safeguards. They are consequently much greater threats to state authority.²⁴² Dormant prohibitions like *Zschemig* also have

²³⁵ 244 U.S. at 218.

²³⁶ *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); see also Young, *Preemption at Sea*, *supra* note 46, at 300-06.

²³⁷ See also *El Al Israel Airlines, Ltd. v. Tsui Yuen Tseng*, 525 U.S. 155, 175 (1999) (holding that the presumption against preemption does not apply to interpretation of treaties).

²³⁸ Nothing in the Supreme Court’s *Crosby* opinion repudiated *Zschemig*, however, and the First Circuit’s aggressive application of that case seems likely to revive interest in the doctrine.

²³⁹ See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001); Young, *Two Cheers for Process Federalism*, *supra* note 67 (manuscript Part I.C.). The extent of that benefit, however, depends in part on the degree to which executive actors are permitted to preempt state law without explicit authorization from Congress. Administrative agencies are designed to overcome legislative inertia in many instances, and they are accordingly more efficient engines of preemption.

²⁴⁰ Again, the efficacy of these safeguards will often depend on the extent to which administrative agencies are given preemptive authority and the extent to which states are given a voice in administrative processes. See Young, *Two Cheers for Process Federalism*, *supra* note 67 (manuscript Part I.).

²⁴¹ See *supra* note 109 and accompanying text (discussing how “resistance norms,” such as the interpretive presumptions at stake in *Crosby* and *Locke*, lower the stakes involved in judicial line-drawing).

²⁴² Cf. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 592 n.10 (1981) (cautioning against “oust[ing] state substantive law on the basis of an amorphous doctrine of national sovereignty divorced from any specific constitutional or statutory provision”); Young, *Preemption at Sea*, *supra* note 46, at 335-37 (explaining why preemption by judicial action is more threatening to state authority than preemption by federal statutes).

affairs exceptionalism and raises the question whether “foreign affairs” is a sustainable category.²⁴⁶ I address that question in the next section.

B. *The Return of Dual Federalism*

Is foreign affairs exceptionalism a form of dual federalism? I think so. Cases like *Crosby* and *Locke* depend on defining particular subject matter spheres—“foreign affairs” as opposed to “traditional state police powers”—and holding that the activity of one level of government is excluded or sharply curtailed when it takes place in the other government’s sphere. The affinity of foreign affairs exceptionalism to dual federalism could not be summed up better than by two of the leading critics of state trade sanctions, who wrote: “The First Circuit’s decision in [the Burma case] should remind states that just as there are constitutionally mandated realms into which the federal government cannot intrude, the federal government also has its own exclusive provinces.”²⁴⁷ These sentiments echo the words of Justice Sutherland, a leading exponent of dual federalism, over sixty years earlier:

Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist.²⁴⁸

248, *infra*). Indeed, Justice Stone’s dissent in *Hines* makes the classic concurrent-powers case against broad preemption rules:

At a time when the exercise of the federal power is being rapidly expanded through Congressional action, it is difficult to overstate the importance of safeguarding against such diminution of state power by vague inferences as to what Congress might have intended if it had considered the matter or by reference to our own conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.

Id. at 75 (Stone, J., dissenting).

Hines is a transitional case, however, because it did not ultimately reject the state alien registration law at issue on the ground of *dormant* federal exclusivity. Rather, the Court held that the federal alien registration statute, in combination with other federal immigration laws, had preempted the field. *Id.* at 66-67 (majority opinion). The result in *Hines* itself was, in many respects, over-determined. The case implicated not only a pervasive federal statutory scheme but also Congress’s plenary powers over immigration law, *see id.* at 62 & n.10, as well as serious civil liberties concerns about the state registration regime, *see id.* at 74. Under those circumstances, it is hard to see *Hines* as establishing any pro-preemption presumption covering foreign affairs cases across the board.

²⁴⁶ *See* Tushnet, *supra* note 245 (“Sustaining a distinction between an expansive power to preempt with respect to international matters and a limited power with respect to domestic ones seems . . . likely to be quite difficult.”).

²⁴⁷ Brandon P. Denning & Jack H. McCall, *States’ Rights and Foreign Policy*, FOREIGN AFF. 13, Jan.-Feb. 2000, at 9, 13; *see also* Tushnet, *supra* note 245 at 25 (comparing *Locke*’s approach to preemption to the *National League of Cities* doctrine).

²⁴⁸ *Belmont*, 301 U.S. at 330-31; *see also* *United States v. Pink*, 315 U.S. 203, 233 (1942) (“Power over external affairs is not shared by the States; it is vested in the national government exclusively.”). Justice Sutherland’s opinion was joined by the rest of the “Four Horsemen”—Justices Van Devanter, McReynolds, and Butler—as well as Chief Justice Hughes and Justice

The problem, of course, is that we do not *do* federalism this way anymore—at least outside the context of foreign affairs.

As I have already discussed, the reason we do not do federalism this way anymore is that it simply became too difficult to define the boundaries of separate and exclusive regulatory spheres for the state and national governments.²⁴⁹ The spheres always turn out to overlap. That is just as true in the case of “foreign” and “domestic” affairs as it was in the case of “inter-” and “intrastate commerce.”²⁵⁰ Why did the First Circuit reject the view that Massachusetts’s law fell within the traditional “state” sphere of state government procurement? Because this procurement regulation was “aimed primarily at” a foreign affairs objective.²⁵¹ But to say so is simply to state that, in this case, the “spheres” of procurement and foreign affairs coincide. The argument hardly proves that this is a “foreign affairs” case rather than a “procurement” one—it is both.

The *Locke* majority’s attempt to distinguish between “the historic police powers of the States” and “area[s] where there has been a history of significant federal presence”²⁵² seems equally unpersuasive. Ironically, the oldest and most prominent cases illustrating the overlap of state and federal spheres are cases about the regulation of navigable waters. In *Gibbons v. Ogden*, the Marshall Court recognized that many forms of state “police power” regulation would cover the health and safety aspects of navigation.²⁵³ And *Cooley v. Board of Wardens* expressly rejected the proposition that navigation was a subject reserved for exclusive federal regulation.²⁵⁴ In light of *Cooley*, Justice Kennedy was forced to recognize “an important role for States and localities in the regulation of the Nation’s waterways and ports.”²⁵⁵ Numerous federal

Roberts. Three justices who had resisted dual federalism in the domestic context—Justices Stone, Brandeis, and Cardozo—refused to accept Justices Sutherland’s reasoning in *Belmont*. See *id.* at 333 (Stone, J., concurring). Interestingly, however, Justice Douglas’s 1942 opinion in *Pink* shows most of the post-1937 New Deal appointees willing to accept dual federalism in the context of foreign affairs.

²⁴⁹ See *supra* Parts I.B., I.C.

²⁵⁰ E.g., Goldsmith, *supra* note 201, at 1670-80; Earl H. Fry, *The U.S. States and Foreign Economic Policy: Federalism in the ‘New World Order,’* in FOREIGN RELATIONS AND FEDERAL STATES 122, 123 (Brian Hocking, ed., 1993) (observing that “it is increasingly more difficult to distinguish between ‘foreign’ and ‘domestic’ policy in federal systems of government”); Spiro, *Globalization*, *supra* note 175 (manuscript Part II.B.).

²⁵¹ See *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 74 (1st Cir. 1999).

²⁵² *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000).

²⁵³ 22 U.S. (9 Wheat.) 1 (1824).

²⁵⁴ 53 U.S. (12 How.) 299 (1851). As I have explained at text accompanying notes 44-48, this concurrent power aspect of *Cooley* has survived longer than the Court’s idea that the dormant Commerce Clause prohibits state regulation of “inherently national” subjects.

²⁵⁵ *Locke*, 120 S. Ct. at 1148.

statutes²⁵⁶ and court decisions from the Founding to the present support that role.²⁵⁷

The navigation cases demonstrate that it has *always* been difficult to define and distinguish exclusive state and federal spheres of regulatory authority. Indeed, it seems likely that foreign affairs is among only a very few substantive areas in which the effort persists. But the globalization of economic markets, communication networks, and personal mobility is putting pressure on that effort in much the same way that the integration of the national economy and society undermined the inter-/intra-state distinction in the first half of the last century.²⁵⁸ Barry Friedman has thus observed that, “as the barriers between countries fall, the lines we have drawn between the national government and the states will come under increasing strain.”²⁵⁹

The most obvious aspect of the strain comes from the integration of economic markets and communication networks. Both enthusiasts and critics of globalization agree that the integration of international markets will make national economies more and more susceptible to the effects of actions in other nations;²⁶⁰ Mr. Filburn’s consumption of his own crop, for example, would affect the price of wheat not only in Omaha, but potentially in Frankfurt as well.²⁶¹ And it is easy to play out the chain of causation game of

²⁵⁶ *E.g.*, Oil Pollution Act of 1990, 33 U.S.C. § 2718(a)(1) (1994) (expressly saving from preemption state authority to impose liability or requirements with regard to oil pollution that exceed the federal statute’s provisions); Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1303, 1311-1315 (1994) (ceding to coastal states title to lands beneath the territorial sea); Outer Continental Shelf Lands Acts, 43 U.S.C. § 1333(a)(2)(A) (1994) (providing that state law governs on offshore platforms on the Outer Continental Shelf); Judiciary Act of 1789, ch. 20, § 9(a), 1 Stat. 77 (now codified at 28 U.S.C. § 1333 (1994)) (providing for concurrent state court jurisdiction over most admiralty cases); *see generally* Milner S. Ball, *Good Old American Permits: Madisonian Federalism on the Territorial Sea and Continental Shelf*, 12 ENVTL. L. 623 (1982).

²⁵⁷ In addition to *Gibbons* and *Cooley*, *see also, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (applying state law to govern a tort suit arising from an accident occurring in navigable waters off Puerto Rico); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978) (upholding the right of states to impose “reasonable, nondiscriminatory conservation and environmental protection measures” on shipping); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding state law imposing strict liability for oil spills in state navigable waters); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding application of a local smoke abatement law to ships docked at international port); *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (“[W]e see no reason why the State of Florida may not . . . govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”); *United States v. Bevens*, 16 U.S. (3 Wheat.) 336 (1818) (recognizing state criminal jurisdiction over a murder committed on board a ship in Boston harbor). *See generally* Young, *Preemption at Sea*, *supra* note 46, at 329-33 (discussing state interests in maritime matters).

²⁵⁸ Barry Friedman, *Federalism’s Future in the Global Village*, 47 VAND. L. REV. 1441, 1444 (1994) (observing that “the globalizing process mirrors the process of ‘nationalization’ that has occurred in this country”). One can say that this continuing process puts ever-increasing pressure on the foreign/domestic distinction without taking any firm position on the extent to which “globalization” is a “new” phenomenon.

²⁵⁹ *Id.* at 1442.

²⁶⁰ ROBERT GILPIN, *THE CHALLENGE OF GLOBAL CAPITALISM* 19-20 (2000).

²⁶¹ *Wickard v. Filburn*, 317 U.S. 111 (1942); *see also* THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* xi-xv (2000) (recounting how the collapse of Thailand’s currency contributed to the failure of domestic business ventures in the United States). I do not wish to suggest

Justice Breyer's *Lopez* dissent one step further, to demonstrate how any in-state activity might have an effect on the international economy. Indeed, one of the reasons Justice Breyer identified for national regulation of guns in schools was the impact of poor learning environments on *global* competitiveness.²⁶²

Two additional aspects of the twenty-first century international environment further undermine any distinction between "foreign" and "domestic" affairs. First, as many scholars have pointed out, the central concerns of international law have expanded from the interactions of nation-states with one another to the relationship of nation-states to their citizens.²⁶³ The result, as Curtis Bradley has observed, "is an increasing likelihood of overlap, and conflict, with domestic law."²⁶⁴ Such conflict frequently occurs, moreover, in areas that—were we still tempted by dual federalism—we would probably think were areas of primarily state responsibility. The International Convention on the Rights of the Child, for instance, has the potential to substantially reshape the family law of many or most United States jurisdictions.²⁶⁵ And various human rights agreements bearing on the death penalty could require changes in the states' administration of their criminal justice systems.²⁶⁶

Are we now to say that family law and criminal punishment are areas of exclusive federal power? Of course not. It is clear, however, that these areas of legitimate (even if not exclusive) state activity have all the attributes that are usually cited in arguing for federal exclusivity. Use of the death penalty by American states—particularly executions of foreign nationals, but also of

that such markets were ever hermetically national; my point is simply that such a suggestion would be even less plausible today than previously.

²⁶² *United States v. Lopez*, 514 U.S. 549, 621 (1995) (Breyer, J., dissenting) ("Increasing global competition also has made primary and secondary education economically more important.").

²⁶³ E.g., Bradley, *Treaty Power*, *supra* note 9, at 396-97; Gerald L. Neuman, *The Nationalization of Civil Liberties, Revisited*, 99 COLUM. L. REV. 1630, 1649 (1999); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1556-57 (1999).

²⁶⁴ Bradley, *Treaty Power*, *supra* note 9, at 397; Goldsmith, *supra* note 201, at 1673 (observing that "the changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations").

²⁶⁵ Anne E. Schneiders, *United Nations Convention on the Rights of the Child: Potential Impact on Abuse & Neglect Litigation*, 5 GEO. J. ON FIGHTING POVERTY 235, 236-38 (1998); David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 172-78 (1998); Susan Kilbourne, Note, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY 327, 330 (1998).

²⁶⁶ Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993); Robin H. Gise, Note, *Rethinking McCleskey v. Kemp: How U.S. Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination Provides a Remedy for Claims of Racial Disparity in Death Penalty Cases*, 22 FORDHAM INT'L L.J. 2270 (1999). Some of these international law arguments may have more merit than others, and in most cases interpretations of the relevant agreements exist which would minimize their impact on state authority. Express reservations to the agreements, moreover, frequently seek to shield state autonomy, although the validity of these reservations is frequently questioned. My point is simply that these heretofore "domestic" issues are increasingly thought to have an international dimension.

American citizens—has brought international protests and threats of international sanctions.²⁶⁷ Differing state regimes on the provision of religious exemptions from generally applicable laws might undermine the United States' ability to "speak with one voice" concerning implementation of the religion provisions in the International Covenant on Civil and Political Rights.²⁶⁸ Failure to ratify the Convention on the Rights of the Child, because of federalism concerns, may undermine the credibility of the national government as it seeks to encourage acceptance of and compliance with human rights principles in this and other areas.²⁶⁹ But if we cannot define an area of exclusive federal power by reference to these concerns—that is, international retaliation or the disruption of national foreign policy—then the whole enterprise of an exclusive federal "foreign affairs" seems questionable.

A second and related aspect of convergence—the increasing prominence of economic issues and other non-security issues on the nation's foreign policy agenda²⁷⁰—will sharpen the point. The Clinton administration, for example, made trade and maintenance of international financial stability a centerpiece of its foreign policy, with the NAFTA and GATT agreements among its most important foreign policy successes.²⁷¹ As Ivo Duchacek has observed,

Today, in contrast to previous eras of international relations, trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory and commuting labour, and transfrontier drug traffic and epidemics have forced their way on to the foreign-policy agenda, usually below, but sometimes parallel with, the great issues of national security, military balance, and diplomatic status. . . . Such a broadening of the scope of international concerns has necessarily affected the interactive relationship between external and internal decision-making processes within and among all nation states²⁷²

²⁶⁷ Spiro, *Foreign Relations*, *supra* note 10, at 1263 (noting that "[i]n the face of [Texas's] execution of Karla Faye Tucker, some members of the European parliament called for an investment boycott of states employing the death penalty").

²⁶⁸ Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENT. 33, 41-49 (1997).

²⁶⁹ Sister Mary Rose McGeady, *The International Need for U.S. Ratification of the U.N. Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 253, 254-55 (1998).

²⁷⁰ Kline, *supra* note 212, at 329 ("[T]he same forces of globalization that merge foreign and domestic issues increasingly blend political, economic, and cultural concerns as well."); Steven R. Ratner, *International Law: The Trials of Global Norms*, FOREIGN POLICY, Spring 1998, at 65, 75 (observing that "trade law is becoming the locus of many critical areas of foreign policy").

²⁷¹ David E. Sanger, *A Grand Trade Bargain*, FOREIGN AFFAIRS, Jan./Feb. 2001, at 65 (arguing that the Clinton administration sought to "reorient American foreign policy" by putting "America's commercial interests—promoting exports and opening markets—on par with the country's traditional security interests"); Ann Scott Tyson, *Clinton Saw Discretion as Better Part of Policy*, THE CHRISTIAN SCIENCE MONITOR, Jan. 19, 2001, at 8 (asserting that President Clinton "crafted for America an economics-driven strategy to replace the military-driven foreign policy of the previous 50 years").

²⁷² Ivo D. Duchacek, *Perforated Sovereignities: Towards a Typology of New Actors in International Relations*, in FEDERALISM AND INTERNATIONAL RELATIONS: THE ROLE OF SUBNA-

Federal exclusivity would be difficult to sustain in all these areas. Not only have states and localities traditionally—and with federal encouragement—engaged in trade missions and other efforts to promote local economic interests abroad;²⁷³ more importantly, international agreements on trade and economic policy will have a pervasive impact on the states' regulation of economic activity within their own borders.²⁷⁴ Many traditional forms of state regulation may be considered non-tariff barriers under the GATT, for example, and states have accordingly pushed for—and been granted—significant roles in the administration of GATT and NAFTA.²⁷⁵

These developments suggest that it would be impossible to draw a bright line, say, somewhere *between Locke and Crosby*, that is, between regulation of commerce and navigation, on the one hand, and “political” affairs, on the other. Regulation of “economic” affairs within a state—if it is sufficiently burdensome on foreign nationals—may cause political protests by foreign governments just as surely as a state's effort to take a stand on international human rights. So, for example, foreign governments sought to influence the *Locke* litigation to protest Washington's tanker regulations just as they intervened in the *Crosby* dispute to protest Massachusetts's anti-Burma policy.²⁷⁶ It is nothing new, of course, to discover that economic issues *are* political ones. The Civil Rights Movement—in which basic issues of civil equality and social morality crystallized around ordinary commercial transactions at lunch counters or on city buses—should have taught us that. We have yet to face up to the critical implication of that fact for foreign affairs: that is, that *both* “economic” and “political” aspects of foreign affairs must be realms of concurrent federal and state authority.²⁷⁷

Many have predicted that globalization of economic and political life will primarily increase pressure for nationalization of governance gener-

TIONAL UNITS 1, 2 [hereinafter *FEDERALISM AND INTERNATIONAL RELATIONS*] (Hans J. Michelmann & Panayotis Soldatos, eds., 1990); see also ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 236 (2d ed. 1989) (observing that “many of the relevant policy decisions in situations of complex interdependence will appear in traditional political perceptions to be domestic rather than foreign”).

²⁷³ Kline, *supra* note 212, at 332-36; Enid F. Beaumont, *Domestic Consequences of Internationalization*, in *GLOBALIZATION AND DECENTRALIZATION*, *supra* note 19, at 374, 380.

²⁷⁴ See Beaumont, *supra* note 273, at 380 (“If we assume that ‘hard’ policies (war) belong to the national government and that ‘soft’ policies (export promotion) can be engaged in by subnational governments without federal constraint, we need to be aware that many issues are becoming blurred.”).

²⁷⁵ E.g., Beaumont, *supra* note 273, at 376-77; Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 *VAND. L. REV.* 1401, 1402-03 (1994).

²⁷⁶ *Compare United States v. Locke*, 120 S. Ct. 1135, 1142 (2000) (noting that “the governments of 13 ocean-going nations expressed concerns [about Washington's regulations] through a diplomatic note directed to the United States,” which a party then filed with the court), *with Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288, 2299-2300 (2000) (noting that “in response to the passage of the state Act, a number of this country's allies and trading partners filed formal protests with the National Government”).

²⁷⁷ See Spiro, *Globalization*, *supra* note 175 (manuscript Part I.B.) (arguing that globalization will bring about the end of federal exclusivity). One need not go all the way with Professor Spiro's far-reaching predictions to accept that globalization may enhance the role of subnational units in foreign affairs.

ally.²⁷⁸ But, there is, as Mark Tushnet has observed, “no necessary connection between globalization and centralization.”²⁷⁹ Indeed, a growing political science literature suggests an opposite dynamic:

When a country’s political, economic, and developmental activities become globalized, the national government may no longer be the dominant entity; transnational cooperations emerge at all levels of government (national and subnational) and among all types of organizations (public organizations, multi-national corporations, and nongovernmental organizations). . . . Global changes occurring today are creating new, complex, and decentralized systems of networks that are radically different from the old centralized systems of governance which controlled the processes of international activities and decisionmaking.²⁸⁰

American states and localities are far from the only subnational communities taking a role in foreign affairs; rather, subnational units in other nations—and particularly in other federal systems—have become active participants in the global arena.²⁸¹ Political scientists have argued that these trends are “irreversible for the foreseeable future,” so that “[t]he question for U.S. inter-

²⁷⁸ E.g., Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1316 (1999) (asserting that “the sovereignty of New Jersey simply makes less sense in the new world order”); Barry Friedman, *supra* note 258, at 1447 (“[W]e are on the front end of a new wave of nationalizing, this one brought about through international pressures. And with this latest wave will come even more pressure to ‘harmonize,’ and a concomitant pressure to reduce state autonomy.”). Professor Friedman recognizes, however, that “globalization may hold some unexpected promise for localism.” *Id.* at 1443.

²⁷⁹ Tushnet, *supra* note 245, at 18.

²⁸⁰ Jong S. Jun & Deil S. Wright, *Globalization and Decentralization: An Overview*, in GLOBALIZATION AND DECENTRALIZATION, *supra* note 19, at 1, 3-4; see also Fry, *supra* note 250, at 125 (observing that “the imperatives of complex global interdependence are pushing the non-central governments to be active participants at the international level”); Brian Hocking, *Introduction to FOREIGN RELATIONS AND FEDERAL STATES*, *supra* note 250, at 1, 3 (“The notion of a hierarchy of political authority, with central government acting as the effective gatekeeper between national communities and their international environment, is outdated” because of “changes in the domestic and international environments.”); John Kincaid, *Constituent Diplomacy in Federal Politics and the Nation-state: Conflict and Co-operation*, in FEDERALISM AND INTERNATIONAL RELATIONS, *supra* note 272, at 54, 73 [hereinafter Kincaid, *Constituent Diplomacy*] (arguing that international activities by subnational governments are beneficial for both economic and democratic reasons). Although they did not discuss the role of state governments specifically, Robert Keohane and Joseph Nye recognized over a decade ago that “complex interdependence” among nations would result in “multiple channels of contact”—both public and private—that circumvent normal foreign policy processes. KEOHANE & NYE, *supra* note 272, at 24-26, 33-35. For similar observations from legal academics, see, e.g., Tushnet, *supra* note 245, at 16-18; Spiro, *Globalization*, *supra* note 175 (manuscript Parts I.B., I.C.).

²⁸¹ See, e.g., Elliot J. Feldman & Lily Gardner Feldman, *Canada*, in FEDERALISM AND INTERNATIONAL RELATIONS, *supra* note 272, at 176, 176-77 (discussing the extent to which “Canadian provinces are international actors”); Daniel Halberstam, *Comparative Federalism and the Issue of Commandeering*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE U.S. AND THE EU (Kalypso Nicolaidis & Robert Howse, eds. (forthcoming 2001)) (noting that the German Länder “will now play an ongoing diplomatic role in the external relations of the Federal Government regarding EU matters”).

governmental relations is . . . how to manage this new area of functional overlap” between federal and state responsibilities.²⁸²

I do not mean to suggest that state activities that have an impact on foreign affairs—whether through domestic regulation of foreign actors or through attempts to influence the policies of foreign governments—may not have negative consequences.²⁸³ Certainly the potential exists for regulatory inefficiency, contradictory positions, and other forms of chaos.²⁸⁴ It would almost certainly be wrong to assert, however, that the risks all lie in the direction of greater state involvement. One political scientist has argued, for example, that attempts by federal officials “to monopolize interactions with foreign entities . . . would lead to bottlenecks in communications, inflexibility in reactions to commercial and other opportunities abroad . . . and ill-informed responses to international stimuli when the domestic expertise resides, as it not infrequently does, in public bureaucracies outside the national capital.”²⁸⁵ The extent to which such difficulties ought to outweigh traditional “one voice” concerns must necessarily turn on complex empirical judgments, and it would be surprising if those judgments came out the same way in all the myriad contexts that make up “foreign affairs.”²⁸⁶

In any event, the federal government’s affirmative powers—which generally include the power to preempt any state initiative that is likely to interfere with foreign policy or foreign commerce—seem largely adequate to deal with this problem.²⁸⁷ Moreover, the dormant Commerce Clause rules that govern domestic regulations will foreclose many of the more offensive state

²⁸² Kline, *supra* note 212, at 341; *see also* Duchachek, *supra* note 272, at 28 (“[I]nternational activities undertaken by democratic non-central governments have already become facts of international life, however much their effects may be minimized as marginal and purely technical by some, or described as portents of diplomatic chaos by others.”).

²⁸³ One potentially important concern arises from the fact that the states will probably not participate *equally* in foreign affairs. States like California or Texas, for instance, might be able to become important international players while states like Rhode Island or New Hampshire might be left behind. Such disparities might raise concerns that some states might use their position in the international community to achieve an advantageous position *vis-a-vis* their sister states. *Cf.* Baker, *supra* note 80, at 1947-54 (voicing similar “horizontal” federalism concerns about conditional spending). The extent and impact of these distributional effects seem difficult to predict with any certainty. I am grateful to Dan Farber for raising this point.

²⁸⁴ KEOHANE & NYE, *supra* note 272, at 35.

²⁸⁵ Hans J. Michelmann, *Conclusion to FEDERALISM AND NATIONAL RELATIONS*, *supra* note 272, at 299, 313; *see also* Spiro, *Globalization*, *supra* note 175 (manuscript Part I.C.) (noting that communication at the subnational level may sometimes be more efficient than routing all communications through central governments).

²⁸⁶ *See* Goldsmith, *supra* note 201, at 1674 (arguing that “we should also avoid the automatic assumption that [subnational foreign relations activity] is normatively undesirable,” and noting that “the federal political branches have made clear that . . . they do not always, or even usually, prefer federal regulation of these new foreign relations issues”).

²⁸⁷ *Cf. id.* at 1680-98 (arguing that the federal political branches are better equipped to monitor and correct state activity in foreign affairs than the federal courts). It is possible, of course, that some state activity that might have an impact on foreign affairs might lie outside the scope of federal power altogether, *cf.* *United States v. Lopez*, 514 U.S. 549 (1995), and therefore outside the scope of federal preemption. But I have already suggested that federal and state regulatory jurisdiction is largely concurrent, *see supra* Part II.B., so that such instances should be rare.

forays into foreign affairs.²⁸⁸ While the coordination problems that remain may well be substantial, clinging to *Zschernig*-type rules may be worse. After all, the difficulty of drawing any principled line between “foreign” and “domestic” suggests that the attempt to develop *special* rules for the former area will be not only unnecessary, but unsustainable.²⁸⁹

I also hasten to acknowledge that some federal foreign affairs *powers*—like the power to declare war—are necessarily (and textually) exclusive.²⁹⁰ But cases like *Zschernig*, *Crosby*, and *Locke* do not turn on these powers. Instead, the numerous but fairly narrow foreign affairs powers that are expressly enumerated in the Constitution have somehow given rise to a *general* foreign affairs power that extends beyond the writing’s confines,²⁹¹ and that general power has in turn been held, at least in some cases, to be exclusive. I question only the latter step here. While defining the limits of exclusive federal powers within the broad field of foreign relations is not without difficulty, it strikes me as easier than trying to decide what is “foreign” and what is not. There is, for example, specific text to work with concerning these powers, as well as a more developed body of case law than has grown up around the *Zschernig* doctrine.²⁹² Nor, it seems fair to say, have the states historically sought to push the limits of these textually-exclusive federal powers.

C. Breard and the Future

The Supreme Court’s third recent encounter with foreign relations exceptionalism—arising out of the execution of Angel Breard, a Paraguayan national, by the State of Virginia in 1998—suggests that the Court has not

²⁸⁸ There was, for example, a serious argument that Massachusetts’s sanctions against Burma were invalid under ordinary dormant Commerce Clause rules. Despite the First Circuit’s extravagant construction of special “foreign” Commerce Clause doctrines, one can glean from the court’s discussion that (1) the sanctions were presumptively invalid because they discriminated against out-of-state activities, and (2) the state’s policy may not have fit within the traditional market participant doctrine under existing law. See Alisa B. Klein & Mark B. Stern, *Back to First Principles: The Constitutional Rationale for Invalidating Local Sanctions Against Foreign Trade*, 33 LAW & POL’Y INT’L BUS. (forthcoming 2001) (developing this argument). I have no particular interest here in arguing this question one way or the other; my point is that the situation does not require *special* rules because of its “foreign” component.

²⁸⁹ Cf. *Jackson*, *supra* note 2, at 2233 n.233 (suggesting that “[b]ecause it cannot adequately be located in a discernible source of consistent legal principle, . . . ‘enclave’ doctrine fails to meet one kind of rule of law concern”).

²⁹⁰ U.S. CONST. art. I, § 10, cl. 3. Actually, federal power is not *entirely* exclusive even here. The provision just cited does permit states to do all these things if “actually invaded, or in such imminent Danger as will not admit of delay.” *Id.*

²⁹¹ Cf. *Alden v. Maine*, 119 S. Ct. 2240, 2254 (1999) (stating that “we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms”) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (asserting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

²⁹² See e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840) (discussing whether extradition agreements are necessarily “treaties”); Bradley, *Treaty Power*, *supra* note 9, at 419-20 (surveying case law on appropriate subject matter for treaties).

completely accepted the exceptionalist view.²⁹³ Breard, who had been convicted of a brutal murder and attempted rape, argued that Virginia had violated the Vienna Convention on Consular Relations²⁹⁴ ("Vienna Convention") by failing to advise Breard of his right to confer with the Paraguayan consulate at the time of his arrest.²⁹⁵ Paraguay attempted to stop the execution by obtaining a last-minute order from the International Court of Justice ("ICJ") mandating that the United States "take all measures at its disposal" to prevent the execution.²⁹⁶ The United States Supreme Court rejected all these considerations, however, and refused to enter a stay.²⁹⁷

It seems fair to say that, viewed solely from the standpoint of domestic law, *Breard* was an easy case.²⁹⁸ Although treaties like the Vienna Convention are binding on the States under the Supremacy Clause, Breard had procedurally defaulted his Vienna Convention claim by failing to raise it in the state courts. As a result, under settled principles of federal habeas corpus law, he was not entitled to raise the issue on collateral attack in federal court—much as he would not have been entitled to raise a claim under the Fifth or Sixth Amendment on habeas if that claim has not first been presented to the state court.²⁹⁹ Likewise, relatively well-settled principles of Eleventh Amendment law barred Paraguay's suit against the State of Virginia.³⁰⁰ Notably, no justice at the Supreme Court disagreed with the majority's resolution of these domestic law issues.

The more difficult question in *Breard* was whether the international aspect of the case, and in particular the ICJ's order, warranted a departure from the ordinary habeas and/or Eleventh Amendment rules. An amicus brief filed by twelve prominent international law scholars argued that it did. Their arguments—which have been expanded in subsequent academic commentary on the case—took a variety of forms: Some argued that either the ICJ's order or an informal request for a stay from the Secretary of State preempted Virginia's execution decision, despite the absence of any formal preemption decision by Congress or the Executive;³⁰¹ others claimed that Virginia's decision was subject to dormant foreign affairs preemption under

²⁹³ *Breard v. Greene*, 523 U.S. 371 (1998). See also Tushnet, *supra* note 245, at 12 n.6 (observing that "[t]he Supreme Court's first confrontation with the relation between federalism and the contemporary globalized political economy came in its hurried decisions in the Breard litigation").

²⁹⁴ Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

²⁹⁵ *Breard*, 523 U.S. at 374.

²⁹⁶ Case Concerning the Vienna Convention on Consular Relations (*Paraguay v. U.S.*), 1998 I.C.J. 248, 258 (Apr. 9).

²⁹⁷ *Breard*, 523 U.S. at 378-79.

²⁹⁸ But see Carlos Manuel Vázquez, *Night and Day: Coeur d'Alene, Breard, and the Unraveling of Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998) (arguing that *Breard* was not in fact consistent with settled doctrine concerning the availability of injunctive relief against state officials). Professor Vazquez does *not* suggest, however, that the *international* implications of the suit should affect the location of the line between prospective and retrospective relief.

²⁹⁹ *Breard*, 523 U.S. at 373.

³⁰⁰ *Id.* at 377-78.

³⁰¹ Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J.

Zschernig;³⁰² still others urged that the Eleventh Amendment should not block treaty claims.³⁰³ All of these claims, needless to say, relied heavily upon foreign affairs exceptionalism.³⁰⁴

Curtis Bradley takes the rejection of these claims in *Breard*—implicitly by the Court and explicitly in briefs filed by the federal executive—as a positive sign that the relevant governmental actors have rejected the “internationalist conception.”³⁰⁵ While Professor Bradley’s view is no doubt true in some important respects,³⁰⁶ I am less sanguine that *Breard* represents a broad-based recognition of concurrent state authority, even in areas that may have an impact on foreign affairs. Rather, I suspect that *Breard* simply “looked” to the Court like a domestic law case, that is, like virtually any of the dozens of last-minute requests for a stay of execution that come to the Court each year. The states’ authority over criminal punishment, coupled with the strong deference to state governments incorporated in the Court’s *habeas corpus* and Eleventh Amendment jurisprudence, made it easy to see the case as falling within a traditional state sphere of authority.

Crosby, by contrast, “looked” like an unusual state attempt to meddle in the *federal* sphere of international human rights policy. But despite the different “feel” of the two cases, they actually raise quite similar concerns. Indeed, the *Breard* case may have a more serious impact on legitimate foreign policy concerns such as the treatment of Americans abroad or the credibility of United States efforts to secure compliance with other human rights measures than would the continued imposition of state sanctions on Burma. The Court’s failure to recognize that *Breard* and *Crosby* raise similar concerns thus suggests that it clings to a dual federalist conception of foreign affairs.

That conception, I hope to have shown, is unsustainable. A better course would acknowledge the reality of concurrent power in a wide variety of areas bearing on foreign affairs and seek to develop sensible rules—both judge-made and statutory—to manage the inevitable conflict when two jurisdictions regulate similar subject matter. To say that “foreign affairs” should not be a special category of doctrine is not, of course, to say that foreign affairs considerations cannot play a role in shaping the structure of concurrent power. As the Court’s continuing struggle to develop workable concurrent power rules in other areas of federalism doctrine illustrates, the

INT’L L. 679, 681-82 (1998); Carlos Manuel Vázquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 AM. J. INT’L L. 683, 686 (1998).

³⁰² Frederic L. Kirgis, *Zschernig v. Miller and the Breard Matter*, 92 AM. J. INT’L L. 704 (1998).

³⁰³ Lori Fisler Damrosch, *The Justiciability of Paraguay’s Claim of Treaty Violation*, 92 AM. J. INT’L L. 697, 702 (1998); Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT’L L. 691, 696 (1998).

³⁰⁴ Curtis A. Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529, 557-61 (1999).

³⁰⁵ *Id.* at 565-66.

³⁰⁶ In particular, Bradley seems correct that the Court refused to depart from American law’s traditionally “dualist” conception of international law—that is, the idea that international law principles like the ICJ’s order are not self-executing federal law in the absence of some domestic law vehicle for their implementation. *Id.* at 530-31 (discussing “dualism” and its internationalist antithesis, “monism”).

concurrent approach is hardly a guarantee of workable doctrine. But at least it starts by asking the right questions, and that is no small thing.

Conclusion

Dual federalism is making its last stand, not under the Commerce Clause, the anti-commandeering doctrine, or the Eleventh Amendment, but in foreign affairs. Nothing in the Rehnquist Court's "federalist revival" denies 1937's recognition of an integrated national market, nor seeks to define exclusive spheres of state regulatory jurisdiction. The Court's new efforts largely accept the reality of concurrent federal power in virtually any subject-matter sphere of regulation. Within this concurrent world, the Court has sought to protect state sovereignty by limiting the means by which Congress can regulate or by raising procedural or interpretive hurdles to federal efforts to supplant state law.

Not so in foreign affairs. The academic orthodoxy, as well as some lower courts, see "foreign affairs" as radically different from the domestic sphere, with virtually no room for state involvement. And while the Rehnquist Court has yet to confront foreign affairs exceptionalism so directly, some of its recent rulings indicate that federalism doctrine will apply differently when "foreign affairs" are at stake.

The problem, I have argued, is that "foreign affairs" is no more sustainable a category than "intrastate commerce" or "state police power" was in 1937. Whether or not "foreign affairs" was *ever* a coherent category, entirely separate from domestic concerns,³⁰⁷ globalization has brought a wave of situations in which the two categories overlap. Unless we are prepared to exclude states entirely from regulating criminal law, family law, or pollution and product safety requirements—to name just a few areas—then state governments are going to regulate in ways that affect foreign relations. Concurrent power over foreign affairs is already with us. It is time the Court and the academy turned their energies from trying to police an elusive boundary between "foreign" and "domestic" to developing doctrines to manage a reality where these concerns are almost always intertwined.

³⁰⁷ Kincaid, *Constituent Diplomacy*, *supra* note 280, at 55-56 ("[T]he notion of hermetic sovereignty has always been more of a myth than a reality for most nation-states, and where a nation, such as the United States, has been very nearly able to exercise such sovereignty, it has been able to do so for only a short time.").